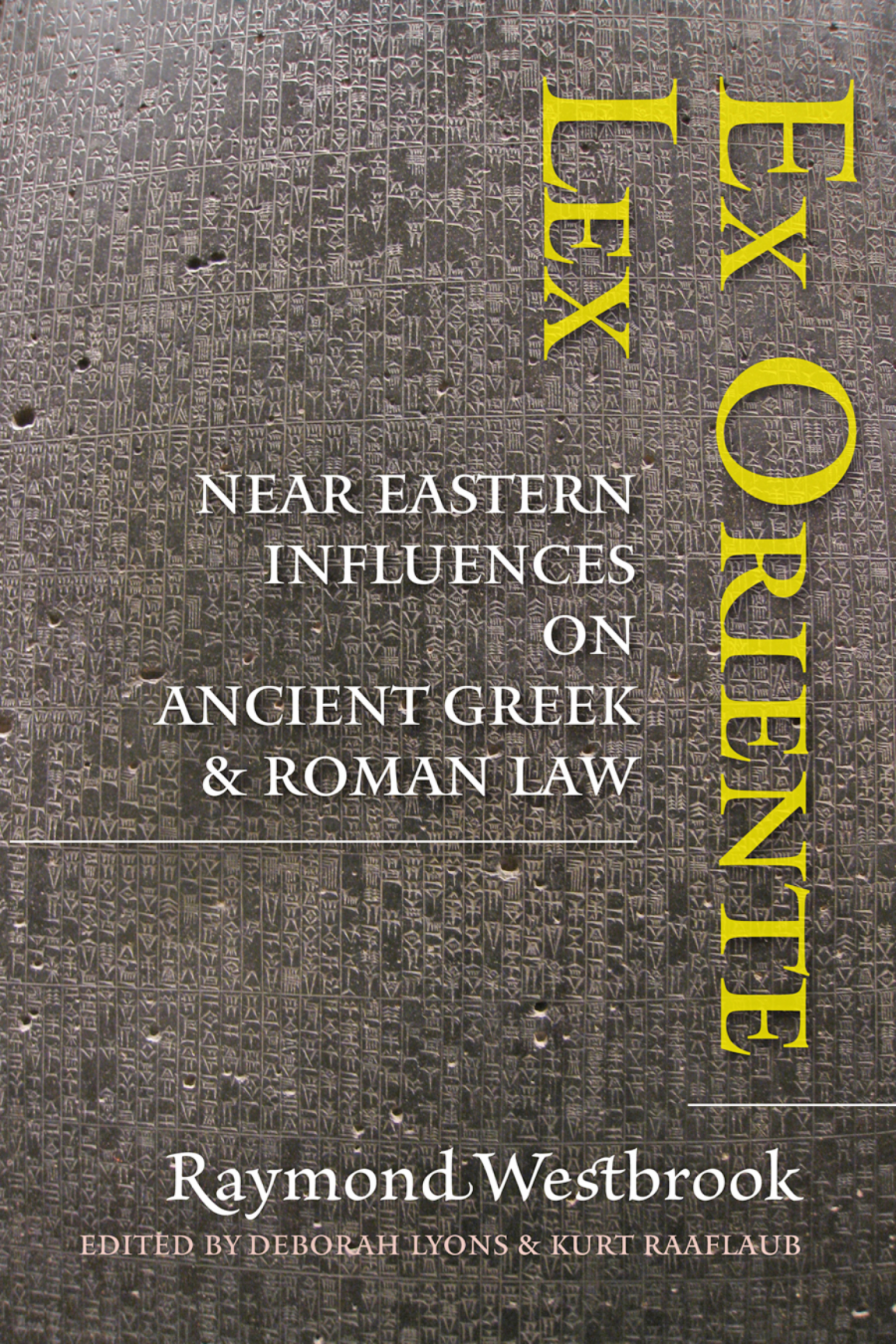
EX ORIENTE LEX
NEAR EASTERN INFLUENCES ON ANCIENT GREEK & ROMAN LAW
Raymond Westbrook
EDITED BY DEBORAH LYONS & KURT RAAFLAUB

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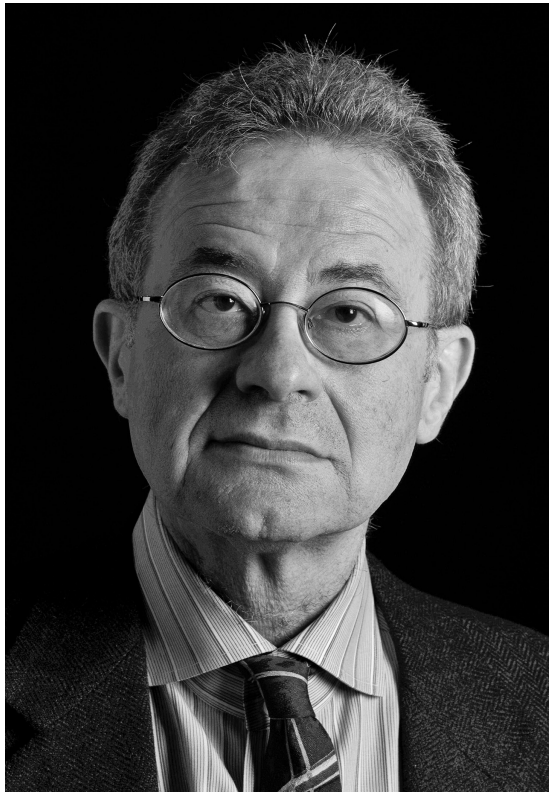

Raymond Westbrook

Ex Oriente Lex

Near Eastern Influences on Ancient Greek and Roman Law

RAYMOND WESTBROOK

Edited by

Deborah Lyons and Kurt Raaflaub

Johns Hopkins University Press

Baltimore

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Printed in the United States of America on acid-free paper
9 8 7 6 5 4 3 2 1

Johns Hopkins University Press
2715 North Charles Street
Baltimore, Maryland 21218-4363
www.press.jhu.edu

Library of Congress Cataloging-in-Publication Data

Westbrook, Raymond, author.
Ex oriente lex : Near Eastern influences on ancient Greek and Roman law / by Raymond Westbrook ; Edited by Deborah Lyons and Kurt Raaflaub.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4214-1467-6 (hardcover : alk. paper) — ISBN 978-1-4214-1468-3 (electronic) — ISBN 1-4214-1467-8 (hardcover : alk. paper) — ISBN 1-4214-1468-6 (electronic) 1. Law—Middle East—History. 2. Law, Ancient. 3. Roman law—Influence. 4. Law, Greek—Influence. I. Lyons, Deborah, 1954– editor. II. Raaflaub, Kurt A. editor. III. Title.
KL147.W475 2014
340.5'38—dc23 20140208oo

A catalog record for this book is available from the British Library.

Photograph of Raymond Westbrook on page ii by James T. VanRensselaer.

Special discounts are available for bulk purchases of this book. For more information, please contact Special Sales at 410-516-6936 or specialsales@press.jhu.edu.

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EDITORS' NOTE

Raymond Westbrook was an exceptionally versatile scholar. Although the bulk of his work—including his important books—was devoted to the legal and diplomatic history of the ancient Near East, he was equally well-versed in the law of ancient Greece and Rome. In a number of articles, published over roughly twenty-five years, he developed and increasingly solidified an original perspective on the initial close dependence of Greco-Roman law on the legal culture and thinking of the ancient Near East, as well as the intellectual process by which Greco-Roman law was eventually transformed into something new and different that stands at the beginning of the Western tradition of law and legal thinking. Many of these articles are greatly relevant to the field of classics but scattered among a wide range of journals and other publications, some of which are not easily accessible or well known to classicists.

It is the intention of the present volume to make this particular dimension of Westbrook's work available to a wider readership of classicists and scholars of ancient Greek and Roman law. We hope that this will encourage a critical and constructive engagement with Westbrook's ideas and arguments—an engagement that can only enhance our understanding of the interaction between East and West in a specific field that was greatly significant in the ancient world and was to have a long-term and deep impact on Western civilization.

As longtime friends and colleagues, we both had frequently urged Westbrook to present his thesis about the debt of ancient Greek and Roman law to Mesopotamian traditions in the form of a book, but *dis aliter visum*. As fate did not allow him to carry out this task, for which he had laid the groundwork in the last year of his life, we hope that this volume will serve the same purpose. Moreover, we are happy that, in addition to reprinting several relevant articles, we have been able to include one previously unpublished piece (chapter 4).

Westbrook's articles were all composed as stand-alone pieces dealing with specific problems. The accumulation of examples served to solidify his position and confirm the plausibility of his thesis; inevitably, each time he had to set the new example in the larger framework of his argument. A sequential reading of the chapters united in this volume will therefore involve

some repetition. For those who would like to begin with a complete exposition of what we might term the "Westbrook hypothesis," we recommend reading the last chapter first.

Our very great thanks are owed to Bruce Wells and Rachel Magdalene, editors of *Law from the Tigris to the Tiber: The Writings of Raymond Westbrook* (Winona Lake, IN: Eisenbrauns, 2009) for their generous assistance. Raymond Westbrook's friend and colleague Jerrold Cooper provided timely answers to a number of queries. Thanks are also owed to the editors of the journals and volumes who have allowed us to reprint Westbrook's articles, and to Matthew McAdam at Johns Hopkins University Press, who encouraged us to pursue this project. We thank Kitty Pucci, who worked wonders to format these challenging texts correctly. Finally, this volume would not exist without the assistance of the family of Raymond Westbrook: Henie Leinwand Westbrook, Hasdai Westbrook, and Harry Westbrook.

Articles reprinted in this volume appear with only minor changes designed to make them more easily accessible to those who are not adepts in the fields of ancient law or Near Eastern studies. We have added translations where needed and supplied abstracts for those articles that lacked them. Certain changes have been inevitable. For example, it has not always been possible to preserve the original footnote numbers. We have gathered all abbreviations into a single list that can be found at the back of the book. Everywhere our aim has been to use as light a touch as possible in allowing Westbrook's ideas to speak for themselves.

Deborah Lyons and Kurt Raaflaub

PREFACE

Westbrook among the Classicists

An Unending Conversation

DEBORAH LYONS

I write not as an expert in ancient law, but as someone who knew Raymond Westbrook as a dear friend and colleague. I was fortunate enough to have the chance to collaborate with him on several projects: a graduate seminar on early Greek laws and lawgivers, a conference on women and property in the ancient world, and the volume that followed.[1] Although these collaborations deepened my interest in and knowledge of ancient Greek law, my own field is Greek literature. In what follows, I speak specifically to the reception and impact of Westbrook's ideas among classicists.

Ray and I were attempting a dialogue from our positions in two very distinct disciplinary fields, and as products of two quite divergent educational formations, so it is not surprising that at times doctrinal differences cropped up between us. My own work is of an anthropological bent—something about which Ray was very skeptical. At the expense of those classicists like me who had been seduced by what Ray regarded as the anthropological fallacy, he used to joke about "Melanesia, wherever that is." To his mind, these distant islands were a less useful and productive comparison for ancient Greece and Rome than were the civilizations of ancient Israel or Babylon. Why go all the way to the early-twentieth-century Pacific, he would ask, when the societies of the ancient Near East were so much closer to archaic Greece and early Rome in space and time—and already connected to them by multiple lines and layers of influence and interaction? I in turn resisted some of his ideas about Homeric society. The good-natured debates between us—I later learned—were high points for the students in our graduate seminar.

Sometimes the resistance that Westbrook's ideas met from classicists was less genial. His interpretations of ancient Greek and Roman law in light of ancient Near Eastern law codes often met with strong opposition. When he first presented his work on the Roman Twelve Tables, according to the

[A version of this preface appeared in *Maarav* 18.1–2 (2011): 151–156. Reprinted with permission, which we gratefully acknowledge.—Eds.]

testimony of those present, the reaction was violent—almost literally so. His insistence that ancient Near Eastern law was relevant, even essential, for the understanding of Greek and Roman law, a position that I will call the "Westbrook hypothesis," brought him up against the all-too-common failing of classicists, the tendency to imagine the culture of Greece as springing full-blown as if from the head of Zeus, acknowledging no other parentage. Undeniable Etruscan and Greek influences have prevented similar notions about the origins of Roman culture, but the idea that early Roman institutions were influenced by the Near East was for some a bridge too far.

Despite such resistance to his hypothesis, Westbrook's work has cast an impressively long shadow in the field not only of ancient law, but also of classics in general. This is in part because the isolationist conception of Greek and Roman culture has been slowly crumbling over the years. The work of Martin Bernal presents the most determined challenge to this notion, and although his work is flawed in many ways, frequently criticized, and accepted with great reservations not only among classicists, it has nonetheless had its effect.[2] Meanwhile, other scholars have made the path between the Mesopotamians and Greeks clearer and better traveled than it was a generation ago. To mention only a few, Sarah Morris among archaeologists, Walter Burkert among scholars of religion, Martin West and Carolina López-Ruiz in the field of literature, and Kurt Raaflaub among historians, have all contributed to a more open-minded approach to Greece's debt to and interaction with the ancient Near East.[3]

Several of Westbrook's colleagues had long urged him to bring all his arguments on this topic together in book form. It is unfortunate that he did not live long enough to do so, as this growing interest in early contacts between Greece and the Near East makes the time right for such a synthesis. That it would now be received with greater open-mindedness among classicists is in part due to Westbrook's own work. I will now briefly address three of his articles in terms of their impact and reception in the field of classics.

Westbrook's ideas on the Twelve Tables, which originally were met with hostility, were published in 1988 in an article titled "The Nature and Origins of the Twelve Tables."[4] In his 2009 discussion of correspondences and differences between ancient Near Eastern and Greco-Roman legal systems, Kurt Raaflaub provides a more dispassionate assessment of the larger argument: "Westbrook goes even farther: in his view, the law codes from Mesopotamia through Israel to Greece and Rome have so many common characteristics, both in form and content, that they must belong to a singular genre. They are connected by, in Westbrook's own words, 'a much deeper underlying intellectual trend.' "[5] In Westbrook's view, Bronze Age law codes belong to the realm

of scientific inquiry, whereas legislation is a separate genre. The later law codes of the Iron Age begin to combine the two. The Twelve Tables "were initially a scientific treatise of law," that was descriptive, not prescriptive. "It was not legislation in the classic sense and certainly not a reform measure called into being by particular historical events."[6] This last sentence is a shot across the bow and perhaps explains the vehement reaction this paper initially elicited. Westbrook is here undermining a cherished narrative, an origin myth about the development of the Roman *civitas*, often told as a series of contestations resulting in the expansion of rights and privileges to an ever wider class of people. In saying this, I pass no judgment on the accuracy of this narrative. I merely observe that Westbrook's revisionist hypothesis struck a nerve.

Here is Raaflaub's analysis of the situation: "Westbrook's reinterpretation of the early Greek and Roman law . . . presents a formidable challenge. Presented, as it is, by one of the few experts fluent in Near Eastern and Greco-Roman law, it must be taken seriously. Can it be correct?" While taking Westbrook seriously, he ultimately demurs. Emphasizing the social and political differences between Greece and the ancient Near East, as well as the limited influence on social and political thought and institutions, he concludes thus: "Where the Greeks [and presumably also the Romans, *my addition*] did incorporate foreign impulses, they transformed and adapted them thoroughly to fit their own conditions and needs."

Raaflaub has argued consistently for the creativity with which Greek culture assimilated, even repurposed, so much of what it took from elsewhere. After all (to provide my own example), the Sphinx underwent a sex change from male to female when arriving in Greece from Egypt. Why should not ancient law have changed its nature too? Yet Raaflaub's critique emerges from a position of respect and sympathy and, perhaps most important, from an ongoing dialogue that focused mainly on two crucial issues: the nature of "law codes" and the transmission of legal ideas and concepts from East to West.[7] While acknowledging undeniable and highly significant influences, Raaflaub also stressed what he considered substantial divergences. On the one hand, he pointed to the fact, established not least by Westbrook himself, that normative laws are not attested in Mesopotamian legal culture, where "law codes" consist of scholarly lists of royal decisions or decrees, whereas Greek "law codes" emerge from a legal culture that is embedded in citizen communities and realized by enacting normative laws, individually and in clusters.[8] On the other hand, Westbrook initially suggested that the Greeks and Romans appropriated the intellectual and material skills needed to create a law code from experts in Near Eastern legal traditions who were physically present in Phoenician settlements in the Aegean and a Carthaginian

community in Rome. He eventually accepted the objection that, inter alia, anything comparable with Near Eastern scribal schools is hard to imagine in the conditions of sixth-century Etruscan or fifth-century republican Rome. He then modified his explanation by pointing to the frequency of inscriptions and monuments scattered throughout the ancient Near East that traveling Greeks could not possibly have overlooked, and suggested that "ideas travel lightly."[9] This implies that anyone could carry ideas along and pass them on to whomever they met on their journeys. This may be correct for some kinds of ideas, but with regard to laws it raises other questions.[10] At any rate, the productive dialogue between Westbrook and Raaflaub, aimed at finding mutually acceptable answers to very basic questions, was interrupted by the former's death. What matters most, though, and remains a crucial part of Westbrook's legacy, is his willingness to engage in this kind of open, honest, critical, and substantive dialogue across the disciplines—the only way to bridge divides and truly advance understanding.

Undoubtedly the most influential among classicists of Westbrook's articles is his piece on the trial scene on the Shield of Achilles in *Iliad* 18, published in 1992.[11] It is notable not only for clarifying a long-contested passage in the *Iliad*, but also for offering a new interpretation of a word in a text in Mycenaean, an early form of Greek that—I am reasonably certain, despite his astonishing linguistic brilliance—Westbrook did not command. I say "reasonably certain" because he did know all the languages found in the classicist's standard tool kit, in addition to a half-dozen Near Eastern ones.

Be that as it may, his article "The Trial Scene in the *Iliad*" has had an extraordinarily broad influence. It is widely known among classicists and has completely penetrated the literature on the *Iliad*, being cited almost universally in commentaries and discussions of the Shield of Achilles. In this article, Westbrook uses Near Eastern parallels to clarify the main point of disagreement among interpreters of the scene. This disagreement has centered on the purpose of the trial. Are the two antagonists in the trial scene arguing over whether the killer has already paid the agreed-upon compensation or whether the dead man's family is willing at all to accept compensation in lieu of the killer's death? Westbrook completely shifted the interpretation, to show that the conflict was over the nature of the homicide. Claiming mitigating circumstances, the killer denies that he intended to murder the victim, and asks that the "limit" (*peirar*) of the compensation owed to the family of the dead man be set at ransom rather than death. As Westbrook argues on the basis of comparative evidence, a reduction of the penalty from forfeit of the killer's life to a payment of compensation (or, more correctly, ransom) would be customary in cases of provoked or accidental homicide.[12]

No less a Homerist than Gregory Nagy endorses Westbrook's interpretation, and he goes on to use the concept of *limit* in an elegant analysis of the Shield scene that widens out to incorporate the world of the *Iliad*, its ancient audience, and finally even us:

> The idea of a relativized *Iliad*, the limits of which are delimited, paradoxically, by the expanding outermost circle of an ever-evolving polis outside the narrative, is compatible with a historical view of Homeric poetry as an open-ended and ever-evolving process. . . . This evolutionary model is the lens through which I see the picture on the Shield of Achilles, with its concentric circles of limits expanding further and further outward. I repeat what I said earlier, this time going one step further. The logic of the litigation scene spills over into the logic of a surrounding circle of supposedly impartial elder adjudicators who are supposed to define the rights and wrongs of the case. Next, the logic of this inner circle of elders spills over into the logic of an outer circle of people who surround the elders, the people who will define who defines most justly. Next, it spills over into the logic of the outermost circle, people who are about to hear the *Iliad*. These people who hear Homeric poetry, as I said, are to become the people of the polis. Ultimately, these people are even ourselves.[13]

The article "Penelope's Dowry and Odysseus' Kingship," first published in 2005, advances a somewhat more adventurous argument.[14] Perhaps I say this because I myself have retained some doubts about his thesis, all the while admitting that if correct it explains a lot about the strange state of affairs on Ithaca during Odysseus' twenty-year absence.[15] Why is his father, Laertes, living in obscurity in the countryside? Why, in fact, is he not king in Ithaca instead of his absent son? Why is the young Telemachos apparently not expected to take over his father's rule in the face of Odysseus' presumed death at sea? And finally, why do the suitors act as if they expect the one who succeeds in gaining Penelope's hand to assume rule over Ithaca along with it? Simply put, Westbrook argues, these anomalies can all be explained if we assume that kingship on Ithaca was not passed through heredity from father to son, but was part of the dowry given by Penelope's father to Odysseus, and assumed to go along with her into any future marriage. I will not go into the pros and cons of the argument here but only observe that this piece took Westbrook deeper into the thickets of Homeric scholarship and literary interpretation than his earlier excursion into the *Iliad*—a tour de force in which he acquits himself brilliantly. It is early to assess the impact of this article within the field of Homeric scholarship, but anecdotal evidence indicates that it has been read and found convincing by

more than a few of my fellow classicists. Time will tell, but the conversation is not over.[16]

I once asked Ray when it dawned on him that he was an Assyriologist. He replied that he had originally been in denial about this for some time before accepting his fate. In fact he preferred to call himself an "ancient lawyer." I always found this designation amusing in its ambiguity. It is a sad irony that in leaving us so young, he never really lived up to the first part of this name. I hope that my remarks have at least partly justified the potentially sentimental second part of my title. I chose it not so much out of sentiment, but out of conviction that the dialogue between Westbrook and the classicists will not end anytime soon.

Notes

1. Lyons and Westbrook 2005.

2. Bernal 1987 (*Black Athena,* vol. 1). Volumes 2 and 3 were published in 1991 and 2006. The negative response is characterized by works such as Lefkowitz 1996; Lefkowitz and Rogers 1996. On the controversy, see Berlinerblau 1999.

3. Morris 1993; Burkert 1992; West 1997; López-Ruiz 2010; Raaflaub 1993.

4. Chapter 5 in the present volume.

5. Raaflaub 2009: 51–52.

6. Westbrook 1988a: 101. (Chapter 5 in the present volume.)

7. See also the introduction by Sophie Démare-Lafont in the present volume.

8. Westbrook 2003b: 12–23; Raaflaub 2009: 45–47. See, e.g., Gagarin 1986, 2008; Hölkeskamp 1999.

9. The former explanation was received in an oral communication; the latter appears in chapter 4 in the present volume.

10. See Raaflaub 2013: 426–431.

11. Chapter 1 in the present volume.

12. See chapter 11 in the present volume for the distinction between ransom and compensation.

13. Nagy 2003: 86–87. Also available as "The Shield of Achilles: The End of the *Iliad* and the Beginnings of the Polis," http://www.fas.harvard.edu/~chs/HPJ/cybershield2.html; accessed September 2013.

14. Chapter 2 in the present volume, also reprinted in Lyons and Westbrook 2005.

15. See Heubeck, West, and Hainsworth 1998 at *Odyssey* 1.188–193.

16. Finkelberg 1991 argues for a pattern of Homeric marriage that supports Westbrook's theory about Penelope's dowry, although Westbrook was skeptical of the way in which she states her argument. I believe that their differences were mostly a matter of semantics.

INTRODUCTION

Raymond Westbrook and the Ends of the Earth

SOPHIE DÉMARE-LAFONT

The title of this short essay borrows directly from an article Raymond Westbrook wrote in 1999, in which he explained how "mental maps" worked in the treatment of legal topics in the Code of Hammurabi.[1] As a kind of posthumous tribute, I wish to invite the reader on a short guided tour of Westbrook's inner legal landscapes, in order to get an overview of his method of analyzing and thinking about the law in antiquity. It is not my intention to discuss his conclusions or to argue for or against his views, but only to show how his reasoning was constructed and to contextualize his thought, with a focus on Roman law.

At a time when medievalists tend to remove the boundaries between Roman and barbarian laws and to speak instead of a mixture of legal cultures during what is now called late antiquity, it is interesting to consider, on the Eastern side of Roman civilization, the possible transmission of some legal traditions originating in the Fertile Crescent. The comparative study of Roman and ancient Near Eastern law is certainly not new. Great German-speaking legal historians from the beginning of the twentieth century like Josef Kohler, Paulo Koschaker, and Mariano San Nicolò cut their teeth on Roman law. Consequently, they read the newly discovered cuneiform texts through the prism of Roman references, though they were reluctant to admit Wenger's idea of a single ancient legal history (*Antike Rechtsgeschichte*).[2] Their work sought to determine how Babylonian law resembled or differed from Roman law, with the ulterior motive, sometimes unconscious, of highlighting the qualities of the latter in contrast to the deficiencies of the former. The use of Roman concepts to designate Mesopotamian legal realities, for instance, the *traditio puellae* ("transfer of the bride") or the *arrha sponsalicia* ("engagement gift") in Koschaker's theory of Babylonian marriage,[3] illustrates this tendency to attract Near Eastern law into the Roman matrix. This tendency culminated in the series of six volumes titled *Hammurabis Gesetz*. Published under the direction of Josef Kohler, this remarkable undertaking collected and translated into German the laws of Hammurabi and almost two thousand Old Babylonian deeds, all interpreted from a Roman perspective.[4] Such a Roman-centered approach has lost ground as our

knowledge of legal practices of the ancient Near East has increased, but the relevance of the comparison is still a matter of debate.

Most contemporary Romanists, especially in Europe, follow the opinion of Edoardo Volterra that early Roman law was never influenced by any foreign legal system.[5] Raymond Westbrook's work subtly challenges this assumption and puts this ever-vexing question back on the agenda. Westbrook's intention was not to search for a hierarchy between the legal systems he was comparing (Greek or Roman vs. Near Eastern). He rather considered antiquity as a geographic whole and sought in the Mediterranean world the signs of a Near Eastern legacy. In the same vein as Reuven Yaron,[6] Raymond Westbrook wanted to bridge the differences between the inventors of legal science and their pioneering precursors in the ancient Near East.

His comparative method relies on two basic premises: (1) there is a common Near Eastern legal tradition, made up of Mesopotamian and biblical law; and (2) parts of this tradition spread to the Greek and Roman spheres. This is not to say that he advocated a revival of Wenger's theory of a unique *Antike Rechtsgeschichte*, nor that he defended any pan-Semitic interpretation of classical antiquity. He was, rather, interested in the circulation of cultures and ideas within the Mediterranean basin. According to him, contacts and exchanges were to be expected throughout this large area. These could explain some apparently atypical or obscure dispositions of Roman law and show precedents for some Greek practices in Near Eastern law.

Both premises challenged the place usually accorded to the two giants that have always cast their shadow over Assyriology in general and legal Assyriology in particular: the Bible and Rome. Thus, the claims of uniqueness that attached—for different reasons—to these two masterpieces of world legal history were seriously undermined. Reactions varied, ranging from rejection by the "strict obedience" scholars,[7] to consideration and sometimes acceptance of Westbrook's challenge to orthodoxy.[8]

Raymond Westbrook's contribution to the discussion introduces a novelty: the suggestion that scholastic traditions from the ancient Near East and early Rome came into contact with each other probably during the period of the Etruscan kings.[9] His basic contention was that written legislation such as the famous Code of Hammurabi or the Laws of Eshnunna on the one hand, and the Twelve Tables or the Lex Aquilia on the other, exhibit the same features and thus stem from the same academic discourse about standard legal problems. Westbrook firmly shared the majority view that Mesopotamian law codes were produced by scribal schools, "based upon a core of precedents expanded by extrapolation to theoretical variations."[10] He detected the

same process in the archaic Roman sources, which survived in later times despite their insertion into a conceptual and legislative framework.

Hence the alleged incoherence of the Lex Aquilia or the imbalance of the formula *vitae necisque potestas*, which he interpreted as displaying significant traces of a Near Eastern influence. The strange structure of the Lex Aquilia, where two statements on damages to property are separated by an odd reference to fraudulent release of debt, is explained against the background of the ancient Near Eastern law codes, where the topics were arranged in chronological order. The inner logic of the Lex Aquilia, Westbrook claimed, is equally chronological: the three examples of responsibility occur at three different points in time.[11] This method of presentation is typical of an academic discussion, borrowed from the ancient Near Eastern legal collections and later inserted without change into the corpus of Republican legislative rules.

A similar reasoning operates in the study of the formula *vitae necisque potestas*.[12] The starting point of the inquiry was the apparent nonsense of the Latin dual phrase, which literally envisions the right to make someone alive or dead. Killing somebody is of course conceivable, but the reverse—namely, the power to raise the dead—is highly unlikely, to say the least. The usual meaning therefore comes down to the alternative between killing and not killing, which sounds like a pleonasm. Contextualizing this phrase in its ancient Near Eastern setting opens another avenue of interpretation: the similarity to the Akkadian sentence "he shall die, he shall not live" (*imāt ul iballuṭ*), referring to the right of the king to condemn or forgive a criminal, offers an alternative explanation to the Roman expression. Here again, the Mesopotamian scientific tradition is said to have found its way into the Roman scholastic tradition, which took over the form of the Akkadian sentence but not its content.

There is no need to multiply examples, as the reader will find plenty of them in the articles gathered in this volume.[13] What seems more relevant here is the central role, according to Westbrook, of intellectual circles as a driving factor in the production of legal material in antiquity. Unless we see the oldest Roman laws as spontaneous creations, the gray areas of the early period of Roman history could be used to reconstruct the cultural melting pot from which legal texts derive. Westbrook suggests a hypothesis based on the literary dependency of the early Roman legal material on the previous Near Eastern tradition. In this pattern, the emphasis is on the reception of the formal structures, not of the legal contents. The shared tradition, as Westbrook saw it, consisted of common ways of thinking and elaborating legal matters: casuistic sentences, pragmatic approach, chronological presentation

of a topic, and "codification of extremes"[14]—all in all, the whole tool kit developed by ancient Near Eastern jurists to exercise their skills. In brief, what is at stake here is not the direct integration of Hammurabi's Code into the Twelve Tables but the influence of the Near Eastern legal tradition preserved in the law collections on the shaping of early Roman legislation.

The process of reconstruction proposed by Westbrook is the logical consequence of his view that the Mesopotamian law collections were deprived of any legislative value and instead were compilations of legal cases invented in order to train jurists in their capacity of thinking. These *summae* were admired as the academic achievements of the "dominant intellectual force" of the moment, which left its print all over the Mediterranean basin.[15] Being a loose phenomenon, the circulation of ideas cannot be traced with precision in this huge geographical and chronological area. Thus, the similarities in style and structure of the documents, and above all the contradictions or incongruities of some Roman provisions, should point to such contacts. There was a time, Westbrook thought, when archaic Rome conceived of and set out the law according to what could be labelled the *mos orientalium*.

The next question then is why this Near Eastern context came to be no longer understood during the Republic. This brings up the role of Greek philosophy, which replaced Mesopotamian scholasticism as the basis of legal science. This profound transformation brought about a drastic change in the reading of the ancient texts, which in turn led to a transformation of their meaning and value. Originally part of a body of learning, they instead became normative legislation through the status of *lex*. This shift from scholastic exercise to substantive law cut off the Romans from the Near Eastern background to which these rules primarily belonged, and thus also escaped the notice of modern specialists. The drafting and wording of the texts remained the same, but their initial purpose and meaning were dramatically modified. Their insertion in a normative set of rules opened them up to categorizations and conceptual interpretations that in turn weighed on the understanding of the provisions.

Whether one agrees or not with this pattern, it should be stressed that Westbrook's approach was anything but Western-centered. One basic assumption underlying his work is that classical antiquity was not the beginning of legal history. Of course, no one would deny the existence and importance of ancient Near Eastern sources of law, but they are usually admired as the oldest traces of an intellectual activity whose legacy in the Western civilization is minimal. On the contrary, Westbrook built a bridge between the two sides of the Mediterranean Sea by claiming the existence of a widely diffused Eastern

legal tradition spreading its influence as far as Europe. This is not to say that Rome was limited to transmitting the Eastern scholastic tradition to us. This was the approach of nineteenth-century French scholars such as the Egyptologist Eugène Revillout[16] or the legal historian Georges Vacher de Lapouge,[17] who both reduced Roman law to a mere copy of Egyptian or Mesopotamian practices. Instead of emphasizing the achievements of these prestigious civilizations, their views resulted in a quest for origins, wholly in keeping with the Orientalist mood of the time. This idea of a direct and continuous link from today back to the Sumerians, skipping over Roman civilization, would never have occurred to Westbrook.

Instead, he addressed the so-called Greek miracle by putting all the characters in a new perspective. He proposed a contact between Mesopotamian science and Roman intellectuals through Phoenician trade and diplomacy early in Rome's history.[18] From this perspective, Rome is seen as a peripheral culture absorbing the influence of the much older Near Eastern one. Such an opinion stands in sharp contrast with the usual Roman-centered analysis of the period. Factoring Mesopotamia into the discussion about the beginnings of Roman history during the eighth and seventh centuries B.C.E. has not always been accepted by classicists, perhaps because of the belief that Rome was some sort of cultural exception from its very beginning. However it may be, putting forward this dissenting opinion took a lot of courage.

The place of ancient Near Eastern law within history of law is still a matter of debate and requires more than technical answers. The similarities between legal cultures, if they are admitted, can be ascribed to borrowings and influences or to mere chance, depending on one's viewpoint and background. Whatever the arguments and conclusions are, it is always worth raising the question. In this respect, Raymond Westbrook's work provides rich material for further reflection and interdisciplinary discussion, and will remain a major contribution to this endless discussion.

Notes

1. Westbrook 1999a.
2. Wenger 1905.
3. Koschaker 1917: 140–141, 230; 1950: esp. 136, 220.
4. Kohler et al. 1904–1923.
5. Volterra 1955: esp. 145.
6. See, for instance, Yaron 1962, 1966, 1974.
7. Watson 1992: 102 n. 18.
8. See, for instance, the extensive discussion by Raaflaub 2009: esp. 44–54, and the more convinced approach of Ibbetson 2004: esp. 99. Not surprisingly,

anthropological studies incline to follow Westbrook's hypothesis, for instance, Bernal 2006: 188.

9. Westbrook 1999c: esp. 220 (chapter 8 in the present volume).

10. Westbrook 1999c: 219.

11. Westbrook 1995a (chapter 7 in the present volume).

12. Westbrook 1999c.

13. About the interpretation of the Twelve Tables as a product of Mesopotamian scholastic tradition, see my article "From the Banks of the Seine to the Bay of Chesapeake: Crossglances on Ancient Near Eastern Law."

14. Hallo 1964: esp. 99 n. 35.

15. Westbrook 1988a: esp. 119 (chapter 5 in the present volume).

16. Révillout 1886: 239 describes Roman law as the sewer of other laws of antiquity ("l'égout des autres droits de l'antiquité").

17. De Lapouge 1886 saw in praetorian activity and Christianity the two major vehicles of the reception of Babylonian into Roman law.

18. Westbrook 1988a: 97–99 (chapter 5 in the present volume).

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CHAPTER ONE

The Trial Scene in the *Iliad*

Abstract

The trial on Achilles' shield is typically understood in one of two ways: as a *factual* dispute (has the killer paid the ransom money or not?) or as a *legal* dispute (is ransom money allowed in this case?). This article opts essentially for the *legal* interpretation but contests the idea that the courts of this period were forums of arbitration and made no binding decisions. Instead, these courts likely functioned much like their ancient Near Eastern counterparts, which had coercive powers. One such power was the establishment of limits on the revenge or ransom that victims of a crime (or their families) could demand. It is the question of just such a limit that forms the core of the dispute in this trial.

The description of the homicide trial depicted on the shield of Achilles is one of the most disputed passages in the *Iliad*, both as to its translation and the legal significance of the trial. A typical modern translation reads:

> In the assembly place were people gathered. There a dispute had arisen: two men were disputing about the recompense (*poinē*) for a dead man. The one was claiming to have paid it in full, making his statement to the people, but the other was refusing to receive anything; both wished to obtain trial at the hands of a judge. The people were cheering them both on, supporting both sides; and heralds quieted the people. The elders sat on polished stones in a sacred circle, and held in their hands sceptres from the loud-voiced heralds; with these they were then hurrying forward and giving their judgments in

[Originally published in *Harvard Studies in Classical Philology* 94 (1992): 53–76. Reprinted with permission, which we gratefully acknowledge.—Eds.]

turn. And in the middle lay two talents of gold, to give to the one who delivered judgment most rightly among them. (18.497–508)

The same translator admits that lines 499–500 could be rendered: "the one was claiming to have paid it in full . . . , but the other was denying that he had received anything."[1] Therein lies the crux of the dispute.

The traditional view, following the latter translation, is that the litigation concerns a question of fact: whether the blood money for a homicide (*poinē*), i.e., the ransom payable by the killer to the victim's family in lieu of revenge, has been paid or not.[2] The other view is that it is a legal question: whether the blood money is acceptable or not.[3] In legal terms, the second hypothesis seems immediately preferable. As already pointed out by Leaf, it is difficult to see why there should be such popular ferment, with heralds and councilors and prizes for forensic eloquence, about a simple matter of the payment of a debt, which could only be settled, if at all, by oaths and witnesses.[4] And as Andersen remarks, there does not seem to be much room for difference of opinion among the elders on a mere question of fact.[5] It must be an issue of principle that taxes the wisdom of the court.

The question then arises, however, what is the precise legal issue before the court? Gagarin supposes that a disagreement exists between the relatives of the victim. One relative has agreed to accept compensation and has done so, but another disagrees with this decision and takes the dispute to a public forum.[6] But then we would expect the dispute to be between the two relatives, or at least for the other relative to be joined. Gagarin's explanation that Homer's comments "only hint at the full complexity of the case"[7] may be questioned on methodological grounds. In the absence of their explicit mention in the text, circumstances cannot be assumed because the case described was never a real event. It is a fiction, a work of literature that has no reality (however realistic the description may be) outside the mind of the author who created it.[8] The more commonly accepted viewpoint is that the issue is simply the lengths to which revenge may be taken,[9] or as Muellner puts it, whether the murdered man's kinsman has the right actually to *refuse* the murderer's offer of *poinē*.[10] But *poinē* is a sum offered by the murderer as ransom for his life, to stave off the revenge to which the victim's kinsman is entitled. Its level is therefore what is acceptable to the kinsman or, more realistically, what may be arrived at by bargaining between the parties. How did the court intervene in this process and impose one party's terms on the other (or did it impose its own terms on both)? In what circumstances would it intervene and on what criteria? Although there are

frequent references to homicide, revenge, and ransom in the Homeric poems, they give no hint of the exercise of such judicial powers.

To answer these questions, we propose to look beyond the Homeric literature itself to the neighboring societies of the ancient Near East. Their copious sources provide the detailed working model of a legal system in which revenge and ransom are an integral part of the judicial process. In the context of that model, the legal issues in the trial will, it is hoped, become clear, and the details of the scene form a coherent picture.

The Ancient Near Eastern Model

The societies of the ancient Near East for which we have written records are diverse in language and culture, but they appear to some considerable extent to have shared a common legal tradition. The underlying structure of their legal systems was the same, while the content of the law drew upon a canon of traditional learning that had originated in Mesopotamia in the third millennium or earlier and spread across the fertile crescent to Anatolia and the Mediterranean coast.[11] This tradition was very tenacious, lasting well into the first millennium, when new ideas from the Eastern Mediterranean began to create a different conception of law.[12] Already in the earliest records from the third millennium, the states of the ancient Near East are revealed as tightly organized societies, with a complex bureaucracy to support the process of government and a system of courts to administer justice.[13]

The courts dealt with private wrongs and offenses against the collectivity, and in both cases handed down judgments that could involve harsh punishments such as mutilation and death. Their jurisdiction could hardly have been voluntary under the circumstances but must have relied on some powers of coercion.

The problem of coercion arises at two stages: bringing one's opponent to court and enforcement of the court's judgment. The former would appear to have been the harder task. We have no evidence of any summons mechanism by the local courts (although it may have existed) or of any powers of arrest, and often the plaintiff would have had to rely on his own powers or the help of family and neighbors. Petitions to the king do appeal to his coercive power, which is also executive, and the king's response is sometimes to summon the parties before him,[14] sometimes to judge in the absence of the defendant,[15] a power which the local courts may also have had, and which would provide a powerful incentive to the defendant to come to court in

the first place. For we do have plentiful evidence of the court's power to enforce its judgments.[16]

Refusal to obey the court's judgment is severely punished by the Hittite Laws:

> 173 If anyone rejects the judgment of the king, his house shall be razed. If anyone rejects the judgment of a district official they shall cut off his head.[17]

The courts of the ancient Near East were therefore more than mere arbitrators of disputes voluntarily submitted to them. They formed a coercive framework, and it is within this framework that the criminal law recorded in the sources is to be interpreted.

The types of wrong which in modern systems would be subject to criminal law, such as homicide, wounding, rape, and theft, also formed a separate category in the ancient Near Eastern systems, but with very different consequences. These wrongs (together with adultery) were not subject to punishment by the State; instead, they gave rise to a dual right in the victim or his family: to take revenge on the culprit and/or his family, or to accept ransom in lieu of revenge. Paragraph 49 of the Edict of the Hittite king Telipinu illustrates the principle in the case of homicide:

> A matter of blood is as follows. Whoever does blood, whatever the owner of the blood says. If he says, "Let him die!" he shall die. If he says, "Let him pay ransom!" he shall pay ransom. But to the king, nothing.

The "owner of the blood" is the closest male relative of the victim. He is known by the same name in neo-Assyrian,[18] as the "owner of the life" in the Middle Assyrian Laws (B 2), and in the Bible as the "redeemer of the blood," i.e., the one who brings it back within the family. The theory is that the blood of the victim has been lost to his family and must be returned. This can be achieved by killing the culprit. As a letter from the Babylonian king to the Pharaoh puts it: ". . . the men who killed my subjects—kill them! Return their blood!"[19]

If, on the other hand, the victim's family opts for ransom, the amount will be negotiated with the culprit and an agreement thereon drafted in the form of a legal contract, as illustrated by a neo-Assyrian document (*ADD* 321):[20]

> A son of B shall give C daughter of D, the scribe, in lieu of the blood. He shall wash the blood. If he does not give the woman, they will kill him on B's grave. Whichever of them breaks the contract shall pay ten mina of silver.

Thus far, the criminal law gives the impression of being very much a private affair between the affected families. How did it fit into the structure of a coercive judicial system? The answer is that revenge was conceived of as

a *legal* remedy, not the mere expression of a personal vendetta. Paragraph 49 of the Telipinu Edict above gives only the theoretical principle; in practice, the rights of the parties were subject to the jurisdiction of the law courts.

With homicide and other serious crimes, the court determined not only the facts of the case but also the legal questions:

a) whether the plaintiff was entitled to revenge at all;
b) the appropriate revenge or ransom to which the plaintiff was entitled.

The plaintiff was not entitled to revenge if the killing was justified. According to Exod. 22:1, the burglar who is killed breaking in at night "has no blood," i.e., there is no blood to be returned to his family through revenge.[21] Where a husband kills his wife and her lover caught *in flagranti delicto*, Hittite Laws 197 rules that "there is no penalty on him."

If the plaintiff is entitled to revenge in principle, its measure is not left to his discretion but is fixed by the court in accordance with the gravity of the crime. Indeed, the idea of unbridled revenge was regarded with aversion. Two passages from the Bible are indicative of this point.

First, there is the boast of Lamech in Gen. 4:23–24: "I have slain a man for a wound on me, a boy for a blow on me. Cain shall be avenged sevenfold, but Lamech seventy-sevenfold." The second passage is the account of Samson's revenge on the Philistines for the wrong that his betrothed's father had done him in giving his bride to another. He burns their crops and commits a great slaughter among them (Judg. 15:1–8).

In both cases, revenge is enforced by self-help and limited only by the avenger's discretion. But both passages are legends describing what was perceived to have been the unsatisfactory situation before the advent of civilized society: Lamech was one of the wicked generation before the Flood, and Samson lived in what was regarded as a period of anarchy, when "each man did what was right in his own eyes."

The court's role was therefore to limit revenge to what was just in the circumstances of the case.[22] At its worst, revenge could be collective, on the culprit and his family, but this would be rare. The more usual choice would be between revenge on the culprit himself and vicarious revenge on a subordinate member of his family, which was regarded as a mitigated penalty. It also needed to be determined what form the revenge was to take: death, mutilation, pain (beating or whipping), humiliation, etc. In this connection the famous talionic rule was but one criterion by which the just limitation on revenge was determined.

It will be recalled, however, that the plaintiff's right was a dual one: to revenge or ransom. In principle, it was the plaintiff's free choice, but here

again the courts intervened, imposing a fixed ransom where they considered that the gravity of the offense did not merit free bargaining. The plaintiff's right to revenge was not thereby extinguished, but it was rendered secondary. It was only realizable if the defendant was unable or unwilling to pay the ransom set by the court. The formulae for the fixing of ransom are various: a number of slaves, a weight of silver, a multiple of the thing stolen in case of theft, the whole of the defendant's property, or the whole of a debt owed by the plaintiff to the defendant. The appropriate limitations on revenge or ransom in a large variety of cases are discussed in the law codes. In order to understand that discussion, it is necessary first to appreciate the particular nature of the law codes themselves. The seven extant cuneiform codes and two biblical codes[23] form a special genre of literature through which transmission of the common legal tradition, in all its vagaries, can be seen.

Although referred to by modern scholars as law codes, they were not legislation. Rather, they were scientific treatises on the law, albeit not scientific in the modern sense. They comprised mainly judicial decisions which had been reformulated and expanded for heuristic purposes to make scholarly legal problems. A canon of such problems formed a repository of wisdom upon which all the ancient Near Eastern law codes drew. In this sense, the codes represent a literary tradition rather than a direct description of their respective legal systems. The individual problems may have begun life as real judgments, but they had long since been divorced from their original context. Where such a problem appears in a code, it signifies neither that it is a common case nor that it is a central rule of law; rather, it illustrates some principle of justice which a wise judge would follow. Indeed, many of the original decisions must have found their way into the canon precisely because they dealt with some particularly unusual or difficult legal problem.[24]

The difficulty with these scholarly problems from the modern point of view is that they do not express the principles that they embody; ancient jurisprudence was incapable of doing that. The ancient court would draw wisdom from them as it sought to do justice in the case before it, but being isolated examples with complex fact situations they could seldom, if ever, act as direct precedents. Furthermore, no single law code reproduces the whole of a particular scholarly problem. Different fragments are scattered across the various codes, so that the original problem has to be reconstructed like a vase from the remaining shards.

On the subject of homicide, five classic examples from the canon of scholarly problems are recorded in the codes: the maltreated distrainee, the

pregnant woman, the goring ox, the tragic accident, and the violent quarrel. For the sake of brevity, we shall confine ourselves to two examples.

1. The responsibility of the owner of an ox that has caused a person's death by goring is discussed by CE 54–58, CH 250–252 and Exod. 21:28–32. In all three the possibility is considered that the owner had previously been warned by the local authority of his ox's propensity to gore, but the consequences differ radically. CE and CH set fixed ransoms at the very low rate usually associated with vicarious revenge (CH 251: ". . . if it gores the son of a man and causes his death, he shall pay half a mina of silver"), whereas Exodus insists that the culprit be killed, or "if ransom be imposed upon him, he shall pay all that is imposed upon him to redeem his life"—i.e., ransom is limited only by the plaintiff's discretion, as in aggravated homicide. Furthermore, vicarious revenge is excluded even when the victim is a subordinate member of the family: "if it gores a son or a daughter, the same rule shall be applied to him."
2. The violent quarrel that leads to injury or death is discussed in four passages:
   CH 206–207: If a man strikes a man in a brawl and inflicts a wound on him, the man shall swear "I did not strike knowingly," and he shall pay the doctor. If he dies from being struck, he shall swear; if it was the son of a man, he shall pay half a mina of silver.
   HL 1: If someone kills a man or a woman as the result of a quarrel/fight, he shall . . . him and give four slaves, male or female.
   HL 10: If someone wounds a man and makes him ill, he shall nurse him. He shall give a man in his place who will work in his house until he is well. When he is well, he shall give him six shekels of silver, and he shall pay the doctor's fee.
   Exod. 21:18–19: If men quarrel and one strikes his neighbor with a stone or fist and he does not die but falls to a bed, if he rises and walks out and about on his stick, the striker is free of liability. He shall only pay for his not working and heal him.

The first point to note is the leniency of the penalties. In the case of injury it is based on the principle of indemnifying the injured party for his actual loss. This is in total contrast to the treatment of injury elsewhere in the codes, where it invariably is subject to talionic revenge or fixed ransom in lieu of revenge. It is this difference in the basis of payment to which Exodus refers when it states that the striker is "free of liability." The exception is HL 10, which adds a fixed payment to the indemnity. But it is an exception that

proves the rule, as this paragraph, unlike the others, omits the element of quarrel—a significant omission, as we shall see.

The penalty for causing death in these circumstances is also relatively low: in HL less than for kidnapping,[25] and in CH a sum which evidently represents fixed ransom in lieu of vicarious revenge.

Accordingly, there must be mitigating factors in the circumstances described in the protasis of these laws. We can identify two:

i) A violent quarrel. The examples cover a fairly wide range: CH talks of a brawl (*risbatum*), while the Exodus text uses a term associated with verbal abuse rather than physical blows (*rîb*). HL uses a term which can refer to a quarrel or a fight (*sullatar*). The impression therefore is of a violent quarrel which can erupt into fighting. It does not at first sight appear the most obvious choice for a mitigating circumstance, but as Driver and Miles have discerned, the point seems to be that it is a situation for which both parties may be blamed.[26] In modern terms we would say that the culprit suffered provocation; the ancient jurisprudence expressed it by referring to a concrete example. This can be illustrated by the report of an actual trial from Nuzi, a town in northern Mesopotamia, from the fifteenth century:[27]

> Unaya son of Hampizi went before the judges in a lawsuit with Aqawatil son of Tarmiya. Unaya said: "Aqawatil struck me in the open fields." The tongue of Aqawatil stated to the judges: "Yes, we fought with one another." Because their statements were in agreement, saying "We fought each other," the judges examined the injuries of both. The head of Unaya with one blow and blood had been let . . . their blows. . . . Unaya won the case, and the judges made Aqawatil pay in accordance with his statement a penalty of 30 shekels of silver: one ox, one ass, and one sheep.

ii) The mental state of the culprit. This is expressly stated by CH to be the fact that the culprit struck "not knowingly." The phrase cannot mean that the culprit did not intend to strike the blow, since in the context of a fight his act could hardly be accidental. It must mean, as Driver and Miles rightly point out, that he did not intend the injury or death that resulted.[28] It was, from the culprit's point of view, an unforeseen consequence. The other law codes do not directly mention the mental element, but Exodus refers to the blow being struck "with a stone or a fist." The reason for this apparently superfluous detail is, we suggest, to distinguish the present case, where the consequences of the blow were not expected to be serious, from the use of a deadly weapon, where the consequence would be predictable.

Accordingly, where both mitigating factors are present, revenge for homicide is limited, being subordinated to a fixed ransom. But the burden of

proving their existence lies with the culprit who would benefit from this limitation.[29] CH requires him to take an oath to establish the second factor;[30] the other systems may have relied on the credibility of his evidence combined with presumptions raised by the surrounding circumstances. Where the culprit cannot discharge the burden of proof, the plaintiff will be entitled to the option of revenge, as is illustrated by the story of the widow of Tekoah in 2 Sam. 14:6–7.

The story is related to king David by a woman who represents herself as a widow from the village of Tekoah:

> Your servant had two sons and they both fought together in the open field, and there was no one to separate them and the one struck the other and caused his death. Now the whole clan has risen up against your servant, saying: "Hand over the one who struck his brother that we may put him to death for the life of his brother whom he killed."

The widow and the clan offer conflicting versions of the facts. The widow asserts that there was a fight and implies that the culprit did not intend to kill with his blow ("struck . . . caused death"—*ymt*),[31] whereas the clan claims that he did ("struck . . . killed"—*hrg*). As the alleged fight took place away from the village and there were no witnesses, the widow cannot discharge the burden of proof on behalf of her son, and no mitigation is possible. Her only recourse therefore is to petition the king to exercise his prerogative of mercy. The king does so, thereby incidentally demonstrating his authority over the revenge system.

The Mycenaean Context

Can the ancient Near Eastern model be applied to the trial scene in the *Iliad*? It is not a question of some distant parallel applied for didactic purposes. The sources in question derive from Greece's neighbors and span both the time of Homer and the era in which his poems are set. The traditions carried by those sources are not those of a particular society or societies but were widespread, covering all the legal systems of the area for which pertinent records are preserved (with the possible exception of Egypt). It is not impossible therefore that these traditions could have entered the Greek sphere, just as Near Eastern myths and, later, the alphabet are known to have done.[32] Their ability to elucidate a Greek source would not then be coincidental.

A specific instance from a different area of law has recently been provided by Russo and Knox, who explain Agamemnon's decision to test his

troops in *Il.* 2.73–75 by reference to the rule in Deut. 20:8 that cowards are to be dismissed before a battle. This is the traditional rule (*themis*) that Agamemnon is applying.[33] The Deuteronomic law, however, mentions other categories who are released from military service. In particular, "the man who has betrothed a wife and not married her shall go and return to his home, lest he die in war and another marry her" (v. 7). In the myth of Keret from the Canaanite city of Ugarit (ca. fourteenth century), Keret musters a huge army for his divinely ordered campaign. So total is the conscription that "the sick man is carried in bed, the blind man gropes his way. Even the newly betrothed goes forth; he leads his wife to another, his beloved to a stranger."[34] In the list of unlikely conscripts, the place of the newly betrothed is comprehensible because of the traditional legal rule that allowed his exemption in normal circumstances.

If we combine these three sources—a seventh-century biblical text, a fourteenth-century Canaanite myth, and the *Iliad* verse—we can discern the existence of a widespread and long-standing legal tradition common to the Greek and Near Eastern spheres, whereby various categories of men might be exempted from a military campaign. It is significant that the tradition finds its way into a law code in Deuteronomy, while in the *Iliad* it is referred to as a *themis*. That a collection of the latter existed for reference by judges[35] is implied by *Il.* 1.236–238: ". . . the sons of the Achaeans who give judgment . . . who keep the *themistes* in Zeus' name."

While no date could be placed on the process of reception posited by us, the evidence of the Linear B documents shows that it was feasible at least as early as the Mycenaean period. The latter attest to an administrative structure which would provide a suitable context for the ancient Near Eastern model and at the same time indicate specific connections with the text of the trial scene.

The Linear B tablets reveal a highly centralized society with a large, bureaucratic administration, on the same general pattern that we have seen in the states of the ancient Near East. Uchitel has shown close parallels with the administration of Ur in the neo-Sumerian period (end of third millennium), without, of course, supposing any particular connection.[36] The central authority of the Mycenaean state is represented by palace and temple, but there is also a local administration called the *dāmos*. Lejeune has shown that while *dāmos can* refer to a section of the population, in the administrative context it has a legal personality and as such possesses land, part of which it appears to hold as communal land, and the rest of which it assigns to individual usufructuaries.[37] The nature of the archive is such that we learn nothing of the substantive law, but the organized society that it re-

veals is likely to have had an equally well-organized administration of justice, especially when one remembers that the rigorous separation of legal and executive powers is a relatively recent invention. It certainly is a context in which the courts could have had the same role with respect to homicide as in the ancient Near East.

Furthermore, Muellner has identified the *dāmos* in the sense of a collective legal entity with the word *dēmos* in the trial scene (line 500).[38] The legal implications of this identification, into which Muellner does not enter, will be discussed below. For present purposes, suffice it to say that, if Muellner is correct, then we have in the trial scene an addition to the small number of attestations to Mycenaean culture so far discovered in the Homeric poems.[39]

The Trial Scene and Homeric Homicide Law

Before we apply the ancient Near Eastern evidence to the trial scene, there is a major objection that needs to be considered. There are many other references to homicide in the Homeric poems, and the consensus among scholars is that the underlying legal system reflected in them is one of arbitration. Disputes were submitted voluntarily to the court, whose judgments could not be binding against the will of the parties.[40]

In this context, the law of homicide was one of private vendetta. The relatives of the victim were entitled to revenge, and although they might accept ransom instead, they were in no way obliged to do so. Once ransom had been accepted, however, they could not continue the vendetta. If they did so, they committed a wrongful act which justified a new vendetta. The external constraints in this system of private vengeance were not legal but at most social, through the expression of public opinion.[41] The killer, therefore, could not look to the courts for protection, but if the offer of ransom were unacceptable, his only safety lay in flight, a course of action frequently mentioned in Homer in connection with homicide. It is the "factual" rather than the "legal" interpretation of the trial scene—i.e., the issue is whether ransom *was* paid or not rather than whether it is *payable* or not—that best fits this system. For if ransom is purely within the discretion of the victim's relatives, what is there to litigate about? There seems no reason for the relatives to refer the matter to a court.

Steinwenter has attempted to overcome this difficulty by arguing that the relatives' rejection of the killer's offer in the trial scene is a mere formality, necessary to found the litigation, which in fact will be nothing more than arbitration.[42] But what need is there for arbitration when one of the

parties has no bargaining power whatsoever? Steinwenter's suggestion[43] that pressure of public opinion forced the victim's relatives to lay the dispute before the court is contradicted by his own insistence that the verdict will be a proposal for composition that is not binding in itself, but only because it is acceptable to both sides.[44] It must therefore be admitted that the trial scene, on the "legal" interpretation, seems inconsistent with the other references in Homer.

The traditional approach to reconciling these references is to suppose a historical development. On this view the trial scene belongs to the later strata of the *Iliad*.[45] It represents a transitional stage[46] between the old private vendetta and the transformation of the law under Drakon into true criminal law.[47]

The resolution of apparently conflicting laws by arranging them historically should be treated with a certain degree of skepticism. There is no external evidence for the process postulated, and it is noteworthy that the evidence of the copious Near Eastern sources, with a history of nearly three thousand years, is also negative. Furthermore, there is the problem of where exactly to place these stages in the course of Greek history. The Mycenaean age, on the evidence of the Linear B texts, would seem less suitable for the earlier stage than the following Dark Age, which would suggest a reverse development. Of course, the earlier stage could be projected back into the pre-Mycenaean period, but then we begin to leave the sphere of Greek history proper and enter the murky depths of an Indo-European tradition. It is not surprising that the protagonists of historical development are vague as to its absolute chronology.

We would therefore propose a different approach, namely, that the trial scene and the other Homeric references indeed represent the same law, but seen from different perspectives.

a) The trial scene is part of a tableau of events from everyday life, depicted on the shield of Achilles. It takes its place alongside such banal occurrences as a wedding procession and agricultural labor. It is set at the level of the local village, not of the royal court, and concerns the lot of the common man. All this is in strong contrast with the normal course of the epic genre, which focuses upon the affairs of the upper stratum of society—of kings and princes, or at least of nobles.

Kings and princes are not necessarily above the law, but they are usually in a better position to avoid its consequences than ordinary mortals. Where they are involved in homicide, the results may not reflect the ordinary workings of the law. For example, flight was undoubtedly an option to which an ordinary killer might have recourse (as he did in the ancient Near

East), but it is unlikely that many would follow the example of Prince Tlepolemus who, after killing his uncle, builds a navy and raises an army before fleeing to escape the revenge of his fellow princes.[48] Clearly, his whole conduct and the potential sanctions against him are in the realm of the political, not the legal.

It is worth comparing at this point the case of Absalom in the Bible. Enraged at the rape of his sister Tamar, he arranges for his retainers to kill the culprit, his half-brother Amnon, and then flees with them, taking refuge with king Talmi of Gashur.[49] If this were our only evidence for homicide in the Bible, we might conclude that it was a reflection on the legal system, or lack of one. It is only because we have a control in the form of the different literary genres within the Bible, such as the laws and narrative accounts of litigation in practice, that we can recognize the Absalom incident for the unusual case that it is. The operation of the characters outside the bounds set for ordinary men is emphasized by the fact that king David is finally induced to pardon his son by the case of the widow of Tekoah, through which he is forced to compare his attitude to his own son with his willingness to pardon a stranger in a banal case involving commoners, where the possibility of flight does not even arise.[50] Indeed, given the striking similarity of Absalom's actions to those of Tlepolemus, it seems to us that the motif of killing, flight, and refuge is an old-established literary topos, whose frequency in Homer reflects less the statistics of social reality than the usefulness of a literary device which adds background to the poem's characters and explains their transfer from one location to another.

b) A seemingly unambiguous statement of the law is made by Ajax in his argument with Achilles in *Il.* 9.632–636:

> . . . a man accepts ransom from the slayer of his brother, or for his dead son; and the slayer remains in his own land for the paying of a great price, and the kinsman's heart and proud spirit are restrained by the taking of ransom.

Ajax's words would at first sight appear to make the question of ransom purely one for the avenger's discretion, with flight as the only alternative, and no role for the courts. In their context, however, they are not a comprehensive statement of the law of homicide; they merely express the theoretical principle, as does the Edict of Telipinu, to which they bear a close similarity. And as in the Edict of Telipinu, they cover in practice only aggravated homicide. As Vatin points out, Ajax is using *a fortiori* reasoning.[51] Ajax's point is that *even* for the most serious of crimes, deliberate murder, ransom is an honorable alternative that is voluntarily accepted, and therefore Achilles should voluntarily accept ransom for Agamemnon's offense, which was

certainly less serious, albeit deliberate. If Ajax's statement were to cover mitigated homicide, such as accidental death, it would lose all its impact.

c) For aggravated homicide, the choice of revenge or ransom is purely in the hands of the avenger. The question of some limitation being imposed only applies if there is some gradation of homicide. That possibility has been raised with reference to the killer's volition. The orthodox view, as expressed by Latte, is that there was no distinction in Homeric law between intent and accident in homicide. The principle was one of "Erfolgshaftung," i.e., strict liability.[52]

Already Leist, however, argued that for involuntary homicide the relatives could be forced to accept *poinē*,[53] and Daube has more recently poured scorn on the theory of Erfolgshaftung as romantic mythology derived from a nineteenth-century belief in the steady progress of mankind and a notion of ancient heroes as elemental force of nature, hitting back without question.[54] The controversy centers on the meaning of the term *ouk ethelōn*, which occurs twice in the Homeric poems.

In *Il.* 23.86–90, Patroclus recalls how as a boy he fled his homeland because in his folly he killed another boy over a game of dice, *ouk ethelōn*, "not willingly," but *kholōtheis*, "in anger." Since Patroclus was still obliged to flee, it has been argued that lack of intention played no role in his culpability.[55] The situation is comparable rather to the scholarly problem from the Near Eastern law codes where one person kills another "not knowingly." As we have seen, there must be two elements in mitigation, a threshold situation for which the killer was not entirely to blame, i.e., a fight or a quarrel in which he was provoked, and lack of intention to strike a fatal blow. Patroclus hints at both: he killed because of anger over some incident in the game, and while he certainly must have wished to strike the other boy, he did not wish his death, i.e., he did not intend the consequence of his blow. But again, as we have seen in the case of the widow of Tekoah, all this may be insufficient to escape liability. The burden is on the defendant to prove these mitigating circumstances. Patroclus' case is therefore more than uncertain, and flight a sensible course. Nonetheless, Patroclus' very mention of his lack of intention shows an awareness of the distinction between intended and unintended homicide and may have been designated to lessen his moral, if not his legal, culpability. It may well have been the grounds on which he was granted asylum and an honorable place at the court of Achilles' father. Of course, one can also dismiss his statement as a mere personal remark without any legal implication, but it is curious that Patroclus should raise the very two factors that are regarded as mitigating in the Near Eastern legal tradition on homicide.

In *Od.* 22.31, Odysseus, acting the part of a drunken beggar, takes his bow and, declaring that he will hit an unusual target, shoots and kills Antinous, leader of the suitors. The latter assume that he killed *ouk ethelonta*, "not willingly." Nonetheless, they declare that he will die for it (25–30). Again this example is taken to show that intention plays no legal role.[56]

Daube interprets the passage as meaning that they believed him to have acted not without intent but without set purpose. They *do* attribute intent to him, but intent that is the result, not of rational planning, but of a drunken fit, just as Patroclus' killing was the result, in Daube's view, of uncontrolled anger.[57]

While agreeing with Daube on the invalidity of the Erfolgshaftung theory, we cannot follow his interpretation in this particular instance. It places a heavy burden on the term "not willing" and attributes to the suitors some very hair-splitting distinctions on the subject of volition. In their context, the words *ouk ethelonta* refer to the suitors' perception of the danger to themselves, or rather, lack of danger. They think that the stranger, being drunk did not intend the consequences of his act, and therefore the most they have to fear is another wild shot from him. Lack of intention is irrelevant to Odysseus' liability for homicide, however, first because there are no other mitigating circumstances, such as provocation, and second because it was caused by inebriation, which serves to negate mitigation, as he has earlier been warned by the suitors, citing the case of the drunken centaur who raped the bride at a wedding feast (21.228–310).[58] Accordingly, they condemn him to death (22.27–30).

In summary, neither of these two cases provides a firm basis for the Erfolgshaftung theory. In spite of their lack of volition, Patroclus is in danger of being held liable because of the burden of proof, and Odysseus is considered liable because of the absence of mitigating circumstances. The possibility of some gradation of homicide based on the mental condition of the offender therefore remains open.

The Trial

Let us re-examine the terms used in lines 499–500. We would translate as literally as possible:

> The one was claiming (*eukheto*) to pay (*apodoûnai*) all (*panta*) expounding (*piphauskōn*) to the *dēmos*; the other was refusing (*anaineto*) to take (*helesthai*)[59] anything.

Note that we have not translated either of the aorist infinitives with the past tense, as is often done. As the aorist is an aspect, not a tense, it is unnecessary to do so, unless one wishes to assign a chronological order to the actions.

Muellner has pointed out that the verb *eukhomai*, used only here in the Homeric corpus in a legal sense, has a direct parallel in what appears to be a record of litigation over land in a Linear B tablet from Pylos.[60] Lines 5–6 of PY Ep 704 read:[61]

> Erita the priestess has and claims (*e-u-ke-to-qe*) to have *etonijo* land for the god, but the *dāmos* says that she has a holding from the common land in usufruct.

According to Muellner, the parallelism of *eukheto* and *phasi* shows that the verb *eukhomai* in a legal context must mean "to state, assert, claim."[62] We would add that since the facts are not in issue in this case (the priestess is expressly stated to be holding the land), her claim may rather be one of right than of fact. She claims the right to hold the land in question absolutely as a temple prebend rather than in usufruct.

On the basis of this parallel, the killer in our Homeric passage is claiming the right to pay ransom (*poinē*) in full (*panta*). This cannot refer simply to any amount that the killer chooses to offer. The concept of a full payment assumes the possibility of a sum fixed by objective criteria, which would constitute the *whole* amount payable. Applying the Near Eastern evidence, we would expect: (a) that the ransom would be fixed by the court, in accordance with the objective criteria of traditional law; and (b) that the basis for such a claim by the killer would be that the case is one of mitigated homicide. If his claim is accepted, then the right to avenge will be subordinated to the payment of ransom, only becoming available again if the killer cannot or will not pay the amount so fixed.

Our expectations are confirmed by the following phrase. The killer, in making his claim, is expounding (*piphauskōn*) his case to the *dēmos*. This is usually translated "the people," identifying it with the rowdy mass of spectators gathered in the town square.[63] But the latter are consistently referred to in this passage as *laoi* (479, 502). As we have seen, Muellner has identified the *dēmos* here with the *dāmos* of the Linear B texts, where besides meaning the common people it sometimes refers to a unit of local administration which holds and assigns common land.[64]

In the Pylos litigation the *dāmos* would appear to have this role, and in a parallel record of the same case the term *kotonooko* (literally: "plot-holder") is substituted, referring to a body of local notables.[65] We would

therefore translate *dāmos* in the Pylos document and *dēmos* in the trial scene as "village" or "commune," referring not to the population but to the community as a legal entity represented by a body of notables.

The killer thus expounds his case to the "village," represented by the college of elders who in lines 503–508 are called upon to give judgment in the case. The reason why the killer and not the other party is said to be arguing before this court is that *the burden of proof is upon him* to establish the existence of mitigating circumstances, as we have seen from our discussion of the Near Eastern sources.

The other party, the avenger, has the dual right to ransom or revenge. By refusing to take ransom, he asserts that the case is one of aggravated homicide and that he therefore has a free choice between ransom and revenge, and he chooses the latter.[66]

The dispute therefore is about what limit the court should impose on the right of revenge or ransom in order to ensure that its exercise will be appropriate to the gravity of the wrong. This is the archetypal role of a court, as we have seen from the Near Eastern law codes, where finding the appropriate limit is the epitome of legal wisdom. It is an ideal choice for representing a model lawsuit.[67]

Our interpretation has been arrived at by placing the trial scene in the context of our knowledge of other legal systems, Mycenaean and Near Eastern. The terms of the dispute can be seen to fit that context exactly. But our conclusions do not rest entirely upon analogy. On the contrary, the text itself states explicitly what we have implied. For the following line (501) reads: "They both wished to obtain from a judge[68] a *peīrar*."

The term *peīrar* is usually translated here as "judgment," "decision," or the like, but that is no more than a guess based on context, and an unlikely one, since in no other reference does *peīrar* have anything like this meaning.[69] The term is a problematic one, it is true, but one meaning is undisputed, that of a "limit," as in *peirata gaíēs*, "the limits of the earth."[70] Thus both parties literally wished to obtain from the judge a limit.[71]

Notes

1. MacDowell 1978: 19.

2. E.g., Calhoun 1927: 18; Bonner and Smith 1930: 32–35; Hommel 1969: 16; Primmer 1970: 11–13; Cantarella 1976: 73–74.

3. Leaf 1887: 122–132; Benveniste 1969: 240–242; Andersen 1976: 12–15; MacDowell 1978: 19–20; Gagarin 1981: 13–16; Gagarin 1986: 32–33; Hammond 1985: 80–81.

4. Leaf 1887: 123, followed by Benveniste 1969: 241–242.

5. Andersen 1976: 12–15.

6. Gagarin 1981: 13–16; Gagarin 1986: 31–33.

7. Gagarin 1986: 33.

8. See Waldock 1966: 11–24; Wallace and Westbrook 1989: 364–365.

9. MacDowell 1978: 20.

10. Muellner 1976: 106.

11. See n. 24 below.

12. See Westbrook 1989a: 218–222.

13. For a survey of the early materials, see Kramer 1963: chapter 3, and the literature cited thereto.

14. E.g., in a letter from king Hammurabi to a royal official in a provincial town (ca. eighteenth century: "To Sin-iddinam, speak: thus says Hammurabi: concerning Ili-ippalsam, the overseer of the bakers, who is engaged in a claim for a field against Sin-gimlanni, son of Bitum-rabi the chamberlain, and Lipit-Ishtar, scribe of Tarbatum's steward, and about whom you wrote; I have just sent Ili-ippalsam the overseer of bakers on a mission to Ur to make sacrifice. As soon as he has completed the sacrifice at Ur, send him to me at Babylon together with his opponents Sin-Gimlanni and Lipit-Ishtar so that their case may be concluded" (*AbB* 2 9 [Frankena 1966: no. 9]).

15. E.g., *AbB* 2 24 (Frankena 1966: no. 24), where a merchant petitions Hammurabi over an unpaid loan of grain, outstanding for three years. Hammurabi examines the loan document and gives orders to his official that the grain plus interest be collected from the debtor and given to the merchant. In 2 Sam. 12:1–6, the prophet Nathan informs king David that in a provincial town a rich man has committed an abuse of power, taking a lamb from a poor man. David is outraged and immediately pronounces sentence on the offender. See further Westbrook 1988c: 30–35.

16. The court of the city of Nippur in the early second millennium, for example, handed down a judgment in an adultery case whereby the guilty lovers were stripped, mutilated, and paraded around the town. They had been brought to the court strapped to the bed on which they had been caught *in flagranti delicto*: Greengus 1969: 33–44. At the royal level, in an Old Babylonian letter, for example, the king dispatches a soldier with the successful plaintiff to help her recover property from the defendant's house: YOS 2 25 (edition in Westbrook 1988b: 136–137).

17. Cf. Deut. 17:12: "The man who willfully disobeys the priest . . . or the judge—that man shall die."

18. Assyrian *bēl dāmi*. Contra *CAD* (*Chicago Assyrian Dictionary*) B 80, but see Roth 1987: 363–365.

19. El-Amarna no. 8:25–29 (fourteenth century). Edition in Knudtzon 1907–1915 (1964): 84–88.

20. Edition in Kwasman 1988: no. 341.

21. See Schoneveld 1973: 335–340. The rule concerning the burglar killed at night recurs in several law codes: CE (see n. 23) 13 and Twelve Tables VIII 12.

22. For a detailed discussion of the courts' role in the revenge/ransom system, see Westbrook 1988c: 39–83.

23. Codex Ur-Namma (CU), Codex Lipit-Ishtar (CL), Codex Eshnunna (CE), Codex Hammurabi (CH), Hittite Laws (HL), Middle Assyrian Laws (MAL), Neo-Babylonian Laws (NBL), Exodus 21–22, Deuteronomy 21–22.

24. For a detailed discussion of the nature of the law codes, see Westbrook 1988a: 82–97. The academic character of the law codes has been strongly disputed by legal historians, but in our view their arguments ignore the cultural context of the codes. For a summary of the arguments and our latest contribution to the polemic, see Westbrook 1989a and the bibliography cited therein.

25. Six slaves for the kidnapping of a free man, according to HL 19b.

26. Driver and Miles 1952: vol. 1, 412.

27. SMN 2131. Edition in Pfeiffer and Speiser 1936: 47.

28. Driver and Miles 1952: vol. 1, 412.

29. In modern criminal law, the burden is in principle on the prosecution to prove the defendant's guilty mental state, but there are some instances, e.g., a defense of insanity, where the burden may be on the defendant. This is the established rule in English law since McNaghten's Case (1843): see Cross 1974: 85. In U.S. jurisdictions, attitudes to the McNaghten rule are more ambiguous: see Gard 1972: vol. 3, 13.

30. Taking the oath was not an easy option. The consequences of divine wrath were feared, and litigants would often settle rather than face the procedure. See Loewenstamm 1980: 341–345.

31. Cf. Exod. 21:18 discussed above: "Struck . . . not die."

32. For reception of the alphabet, see Naveh 1982: 175–186; Bernal 1990: esp. 53–70. For the reception of myth, see Burkert 1979: 7–10, 20–22, 80–83, 99–142; and Jacobsen 1984: 20–22. For a more general (and controversial) view of the West Semitic impact on Mycenaean Greece, see Astour 1965.

33. Russo and Knox 1989: 174–180. Dumézil (1985: 26–29) points out that this is to be the first major engagement of the war.

34. Col. II, lines 98–103; col. IV, lines 186–191. Edition in Ginsberg 1946.

35. For the suggestion that the ancient Near Eastern law codes may have had the same function, see Westbrook 1985a: 253–258.

36. Uchitel 1988: 19–30.

37. Lejeune 1965: 3–16.

38. Muellner 1976: 104.

39. Discussed by Page 1959: 218–251; and Kirk 1975: 833–837.

40. E.g., Biscardi 1982: 275–278; Bonner and Smith 1930: 11–19, 29–31; Calhoun 1927: 17–18; Gagarin 1986: 42–43; Hommel 1969: 30–31; Steinwenter 1925: 29–30.

41. Cantarella 1976: 5–6.

42. Steinwenter 1948: 13.

43. Steinwenter 1948: 13.

44. Steinwenter 1948: 15.

45. Steinwenter 1925: 34–36.

46. Andersen 1976: 12.

47. Cantarella 1976: cf. 7–8 and 73–74.

48. *Il.* 2.661–666.

49. 2 Sam. 13.

50. 2 Sam. 14:19–21, and see above.

51. Vatin 1982: 276.

52. Latte 1933: cols. 280–281.

53. Leist 1884: 328–334.

54. Daube 1969: 171–172.

55. Latte 1933: cols. 280–281; Bonner and Smith 1930: 21; and Cantarella 1976: 33–34.

56. E.g., Gagarin 1981: 11.

57. Daube 1969: 171–172.

58. The connection is noted by Daube 1969: 171–172. It is disputed by Gagarin (1981: 12) on two grounds: (1) the incident of the drunken centaur is more than a hundred lines earlier; (2) it does not imply that the same degree of intentionality underlines a drunken rape and a drunken accident. But however many lines separate Odysseus' act from the centaur's, they are part of the same scene. Indeed, the mention of the centaur has no point, unless it is to lay the groundwork for Odysseus' culpability for a drunken act. If inebriation goes to the question of mitigation rather than of intention, as we have argued, then any difference in intentionality between rape and homicide is irrelevant.

59. Muellner 1976: 102 suggests that *helesthai* cannot have the sense of "to accept." But the verb is used in the *Iliad* in the sense of accepting something offered, as in 7.482 and 9.709: *hupnou dōron helonto* —"they took the gift of sleep."

60. Muellner 1976: 102–104.

61. *e-ri-ta i-je-re-ja e-ke e-u-ke-to-qe e-to-ni-jo e-ke-e te-o da-mo-de-mi pa-si ko-to-na-o ke-ke-me-na-o o-na-to e-ke-e*. Edition in Bennett and Olivier 1973: 126.

62. Muellner 1976: 104. Muellner also prays in aid use of the verb in Homer for assertions of pedigree (e.g., *Il.* 14.113–114), rejecting as artificial Benveniste's attempt (1969: 237, 240) to interpret such assertions as self-consecrations in the manner of Roman *devotio*.

63. Wolff in particular (1946: 41–42) constructs a scenario in which the people's applause of each speech by an elder is decisive of the outcome. But this requires the people to listen in silence, which they are obviously not doing; they are cheering on the rival parties (not the judges!) and having to be held back by the heralds while the elders speak.

64. Muellner 1976: 102–104.

65. PY Eb 297: *i-je-re-ja e-ke-qe e-u-ke-to-qe e-to-ni-jo e-ke-e te-o ko-to-no-o-ko-de ko-to-na-o ke-ke-me-na-o o-na-ta e-ke-e*. Edition in Bennett and Oliver 1973: 94. See Lejeune 1965: 11–16. From PY Ep 301.2–4, Lejeune concludes that

the college of notables was twelve in number. The term *geronsiā* ("council of elders"?) also appears at Pylos (PY An 261). The relationship between the two bodies is not clear.

66. Cf. the Gibeonites in 2 Sam. 21:4–6 who, when asked by king David what remedy he can offer them for the massacre perpetrated upon them by his predecessor king Saul, reject ransom and demand instead vicarious revenge: the execution of Saul's seven sons.

67. The Near Eastern idea that such limitation represents the triumph of civilization over chaos (i.e., unbridled revenge) is graphically reflected in the detail of the heralds holding back the noisy crowd, i.e., forming a boundary within which the elders can give their judgments in good order. Cf. the different descriptions of the opposing armies in *Il.* 3.1–9: the Trojans are a noisy rabble, clamoring like cranes, while Achaeans advance in disciplined silence. I am grateful to Professor J. Russo for drawing my attention to this passage.

68. *ístōr*, literally "one who knows" (see Nagy 1990: 250–252, 258–259). Without entering into a discussion of the meaning of this difficult term, which would take us beyond the bounds of our topic, we regard as most plausible the view that the *ístōr* was that one of the elders whose opinion was ultimately adopted as the judgment of the whole body, and who thereby gained the two talents of gold put up by the litigants as a court fee. See Pflüger 1942: 146–148. On this view, the *ístōr* would naturally be the judge most knowledgeable of the traditional law.

69. Nothdurft (1978: 25–40) proposes a radical new interpretation: that *peīrar* refers to the means rather than the end. To turn this interpretation into "judgment" in the trial scene, however, Nothdurft is forced to supply an extra word (*peīrar*) *díkēs* ("means of achieving judgment") and then assume that it had dropped out of the phrase at some earlier stage (1978: 33–34). More reasonable is Hommel's translation (1969: 16): "Nun begehrten beide, vor dem (Rechts)-kundigen zu einem *Ende* (ihres Streits) zu gelangen," although the result is a somewhat banal and unnecessary statement.

70. E.g., *Od.* 4.563. On etymological grounds, Heubeck (1972: 139–140) proposes a basic meaning of "(äusserstes) Ende, Grenze."

71. It might be argued that the plaintiff sought the absence of any limit, but this is incorrect. The court's judgment would set a limit on his rights by the very act of defining them; he wishes that limit to be revenge, not fixed ransom. His revenge would still be limited: to the culprit himself or perhaps a member of his family. It is worth noting here the difference between judicial revenge and revenge in war in the *Iliad*, where no limits apply. As Cantarella points out (1976: 18–20), the battles in the *Iliad* are presented as a series of related acts of revenge. Legitimate vengeance in these circumstances, however, was not confined to the original killer, but was satisfied by striking indiscriminately at all members of his group (e.g., *Il.* 14.449–474). See further the discussion of revenge in war and within the legal system in Westbrook 1988c: 92–99.

Penelope's Dowry and Odysseus' Kingship

Abstract

A great deal of difficulty surrounds any attempt to reconstruct a legal system from the disjointed allusions to law within Homeric poetry. By understanding these allusions in the light of ancient Near Eastern legal traditions, however, a coherent system can be reconstructed. This study of Penelope's dowry and its attendant arrangements in the *Odyssey* presents a case in point. Moreover, it demonstrates that a proper legal understanding of how a dowry functioned helps to explain certain actions on the part of Odysseus, his son, and Penelope's subsequent suitors.

Introduction

The Homeric poems contain references to legal rules and practice but in the form of fragmentary, unconnected allusions. Attempts to recreate a system from these references alone are doomed to failure. They will inevitably create an imaginary legal universe, where literary topos is identified with legal rule, and legal institutions are artificial constructs.

Fragmentary references can only be understood when placed in the context of a working legal system. In exposing the underlying principles that they represent, the proper context not only enables us to judge whether the visible fragments are internally consistent but also reveals the application of hitherto unrecognized rules in the narrative. The proper context, however, is lacking. There are virtually no contemporary sources of Greek law, at any

[Originally published in R. W. Wallace and M. Gagarin, eds., *Symposion 2001: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, vol. 16 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2005), 3–23. Reprinted with permission of the publisher and the family of Raymond Westbrook, which we gratefully acknowledge.—Eds.]

time from the Mycenaean period, in which the poems are set, to the seventh century, when the process of composition is presumed by most scholars to be complete.

The nearest well-documented system is classical Athenian law. Scholars are understandably reluctant to force its sophisticated technicalities upon the very different society described in the Homeric poems. Instead, recourse is had to ethnographic data which, having no historical connection whatsoever, can only serve to support the feasibility of putative structures. It cannot serve as confirmation that imagined laws existed in reality.

I propose as a more satisfactory substitute not a single system, but rather, a whole legal tradition. The societies of the ancient Near East were diverse in language and culture, but they appear to some considerable extent to have shared a common legal tradition.[1] The underlying structure of their legal systems was the same, while the content of the law drew upon a canon of received wisdom that had originated in Mesopotamia in the third millennium or earlier and had spread across the fertile crescent to Anatolia and the Mediterranean coast. The tradition was very tenacious, lasting well into the first millennium.[2]

The ancient Near Eastern legal tradition was thus contemporary with Homeric society, whichever period is taken as applicable, and in close geographical proximity. At all material times there were extensive contacts between the two areas and demonstrable cultural influences.[3] I have argued elsewhere that those influences included elements of legal culture.[4]

When seen in the context of ancient Near Eastern law, Homeric law presents a coherent, viable system that fits into the mainstream tradition. The variants that it displays are no greater than those exhibited by any individual system within the ancient Near East. Furthermore, the tradition acts as a control for classical Athenian law, identifying elements that already existed in earlier periods.

As an example, I propose to examine the case of Penelope's dowry. Using the Near Eastern legal tradition and Athenian law as a framework, I hope to show the legal coherence of her dowry arrangements, their wider constitutional significance, and how they were used to subtle effect in the narrative. The results will be further evidence, I hope, that the widespread ancient Near Eastern legal tradition did not stop dead at the shores of the Eastern Mediterranean.

Marriage and Marital Property in the Ancient Near East

One of the advantages of the huge amount of legal material available from the ancient Near East is that we can avoid reliance on isolated parallels. This survey, being concerned with a common tradition, is based either on rules that recur in more than one system or on principles or concepts that are illustrated by rules from different systems, even though individual solutions may vary and even conflict.

Marriage, which created a relationship of status between husband and wife, was preceded by betrothal, a contract normally between the groom and the father of the bride. Betrothal could be sealed by a payment—the so-called "bride-price"—by the groom to the bride's father. Marriage and purchase were in fact two distinct institutions, and the payment had nothing to do with a price.[5] It would be better to refer to it as a betrothal payment, since it inaugurated a special state of betrothal.[6] To avoid confusion, however, the conventional term will be retained here. The "bride-price" was not necessary, but it was desirable, because it secured for the groom an exclusive right to the bride. As far as outsiders were concerned they were already married, pending the groom's exercise of his right to claim the bride from her father's house.[7] The various languages of the region all have a special technical term for bride-price, e.g., *terḫatu* (Akkadian), níg.mí.ús.sá (Sumerian), *mōhar* (Hebrew, Aramaic), *kussata* (Hittite). Some languages (e.g., Hebrew, Ugaritic) also have a verbal form from the same root.

The dowry was in essence a gift from the bride's father to the bride, which could be enhanced by gifts from other sources. Economically, it represented her share of the inheritance, but legally it differed fundamentally from male inheritance. As in Athenian law (and exactly as in *Od.* 14.208–209), sons had a vested right to their father's estate, which they divided by lot after his death, but a father was not obliged in law to provide his daughter with a dowry; it was theoretically a voluntary gift.[8] The terminology reflects the distinction. Technical terms for dowry are derived from words for gift or in some cases are simply a word for gift, e.g., *nudunnû*, *šeriktu* (Akkadian), sag.rig$_7$, níg.ba (Sumerian), *iwaru* (Hittite), *šilluḫîm* (Hebrew), *ṯlḫ* (Ugaritic). Frequently, no special term at all is used, the context supplying the special purpose for the transfer of property.

The dowry entered the husband's house with the bride and was thus transferred to him. It disappeared into his assets for the duration of the marriage. The duality of the transfer is reflected in a slight ambiguity of language. Sometimes the father is said to give it to his daughter, the bride,

who brings it with her to the husband's house. At other times he is said to give it to the husband with his daughter.[9]

Except for a small and significant part, to which I shall return, the husband had control and management of the dowry property. What the wife had was a right to restoration of the dowry on termination of the marriage. Her right was not to the return of specific items but to their full value. If she could be said to retain ownership in the dowry, it was only in the sense of a contingent ownership in a fund. If by the end of the marriage the husband had dissipated dowry assets, the shortfall had to be made good from his own property.[10]

If a wife survived her husband, the dowry served to provide for her during her widowhood. On her death, it would be inherited by her children and her children only. The sources emphasize that neither the husband, his family, nor his children by another marriage were entitled to inherit the dowry.[11] If, on the other hand, the widow remarried, her children from both marriages were entitled to share after her death. In the meantime, the second husband controlled the dowry assets just like the first. It is important to note that if she predeceased her second husband, her children would have to wait until his death in order to inherit her dowry.[12]

The "bride-price" has no equivalent in Athenian law, but the contours of the law of dowry will be very familiar. The Athenian *proix* had the same legal basis and followed the same devolution.[13] So also did the wife's marital property at Gortyn.[14] The most notable difference with Athens is that the ancient Near Eastern widow seems to have had somewhat more independence, becoming head of household if her children were still young, not necessarily being obliged to return to her father's house (except in some cases where childless), and having control over her dowry and her own remarriage.[15]

Homeric Marital Property

References to marital property in the Homeric poems fit neatly into the above pattern. The "bride-price," which is designated by the term *hedna* (see below), is normally given by the groom to the bride's father (*Od.* 8.318–319).[16] Payment secures the bride against third parties (*Od.* 6.159; 15.16–18; 16.390–392; 21.160–162) and entitles the groom to claim the bride at the father-in-law's house (*Il.* 22.471–472). It is not a necessary item; some marriages are said to be "without 'bride-price' " (*anaednon*).[17]

Dowry is not designated by a technical term; instead words for gift are used (*meilia*, *doron*), with the context revealing that the gift in question

was a dowry, namely that the bride's father is giving it to the groom. The father is said to give it either directly to the groom (*Il.* 6.191–193; *Od.* 7.311–315; cf. *Hymn to Aphrodite* 139–140) or indirectly through his daughter (*Il.* 9.147–148; 22.51), hence the epithet *alochos poludoros* for Penelope (*Od.* 24.294; and for Andromache: *Il.* 6.394). The dowry is subsumed into the husband's assets and is used by him. A clear example is Priam's decision to ransom two sons of his who have been captured: "We will certainly ransom them with bronze and gold, for there is much of that in my house; for many gifts did the old Altes, of glorious name, give to his daughter" (*Il.* 22.51). Priam's policy is to limit the amount available for ransom to the value of the son's mother's dowry (a sensible approach, given the number of wives and sons that he has). The funds, however, are in his possession. The first person plural verb could refer to Priam and his wife jointly but could equally be unspecific or (the most likely hypothesis) refer to Priam and Hector, whom Priam is addressing at that moment. There is no evidence as to the devolution of the dowry after termination of the marriage.

Penelope and Marital Property

There are two passages where the term *hedna* is used regarding Penelope, on the contingency of her returning to her father's house and the latter giving her in marriage to one of the suitors. In *Od.* 1.276–278 (=2.196–197) it is stated:

> Let her go back to the hall of her powerful father, and there they will prepare a wedding feast and make ready the gifts (*artuneousin eedna*) in their abundance, all that should go with a beloved daughter.[18]

According to *Od.* 2.52–54:

> They (the suitors) shrink from going to the house of her father, Icarius, that he may himself see to his daughter's bride-gifts (*eednosaito*), and give her to whom he will.

The possibility that in the context the term should be interpreted as dowry, or at least as a gift from the bride's father to the groom (as Murray's translation suggests), has led to a lively debate on the nature of marital gifts.

According to Finley, *hedna* was a general term for gifts accompanying marriage in either direction. The system was one of gift-exchange, in which the groom's gifts to the girl's father were intended to provoke a counter-gift commensurate in value, together with the girl herself.[19] Snodgrass rejects

Finley's schema, pointing out that there are no cases in Homer (with one dubious exception) of parity between the groom's gifts and the bride's father's gifts that would suggest gift-exchange. Instead, there are at least two forms of marital gift, bride-price and dowry. Anthropological evidence adduced by Snodgrass shows that their coexistence in the same legal system is unlikely. His conclusion is that Homer does not present a coherent system but describes a mixture of practices, derived from a diversity of historical sources.[20]

Against Snodgrass, Morris argues that the marriage practices described by Homer are consistent, but he reaches this conclusion only by denying the existence of dowry altogether in Homeric society. In his analysis, *hedna* are in all cases gifts from the groom; *dōra* are gifts exchanged in both directions, a distribution apparently found also among the Trobriand Islanders.[21]

From the Near Eastern perspective, a debate centered on reservations about the compatibility of "bride-price" and dowry is bemusing. A typical marriage involved both, not to mention the possibility of gifts from other relatives to the bride, from husband to wife, from groom to members of the bride's family—even a settlement by the groom's father on the groom.[22] In marriage negotiations between the rulers of Egypt and Babylonia (fourteenth century), for example, the Babylonian king shamelessly tries to bid up the "bride-price" for his daughter ("If during this summer, in the months of Tammuz or Ab, you send the gold I wrote you about, I will give you my daughter"), while the Pharaoh tries to shame his counterpart by suggesting that he has a mercenary attitude to marriage ("It is a fine thing that you give your daughters in order to acquire a nugget of gold from your neighbors!"). Nonetheless, when the marriage takes place, it is accompanied by a sumptuous dowry, not to mention further gifts from the Egyptian side.[23] There was also a non-binding custom whereby the bride's father would return the "bride-price" to the groom as a supplement to the dowry.[24]

In assuming a contradiction, Finley and Snodgrass confuse the economic and legal aspects of marital gifts. The dowry is a share of the paternal estate and has essentially an economic function: its purpose is to help set up a household for the new couple, to maintain the wife during widowhood, and to provide the issue of the marriage with an inheritance. The essential function of the "bride-price," in contrast, is legal: its purpose is to secure the bride against the claims of outsiders. There is no reason for them to be equal in value or to be compared on that basis.

If the "bride-price" has a specific legal function, then it is understandable that it would be described by a dedicated technical term. In the Homeric poems, the term *hedna* in all cases except the two passages under discussion

unambiguously describes a payment from the suitor to the bride's father.[25] In the context of the Near Eastern parallels, this fact suggests that *hedna* is indeed a technical legal term, not a vague description of marital gifts going in either direction. In interpreting these two ambiguous passages, therefore, we agree with those scholars who regard *hedna* as a "bride-price" that Penelope's father demanded for her rather than dowry that he gave with her.[26]

There is a further reason for rejecting the notion that Penelope's father was about to dower her. The marriage in question was Penelope's second, and she would already have a dowry from her first marriage. It might well have been acceptable for a widow (or her family) to demand a "bride-price" from her subsequent spouse(s),[27] but it could not be expected of her family that they provide her new husband with what was in practice an inheritance share every time she remarried. Following both the Near Eastern and the later Athenian pattern,[28] we would expect Penelope to take her dowry from her first marriage with her when she left the matrimonial home to enter her second marriage.

Given Penelope's high status and the fact that she is called *poludoros*, we may assume that she brought a substantial dowry into her marriage to Odysseus. We can immediately identify two items.

In the ancient Near East, a small part of the dowry did not follow the normal path described above. Instead, the wife retained control of the property. By the same token, she bore the risk of it perishing, the husband or his heirs having no duty to reimburse her on termination of the marriage. In Rabbinic law it is called *melog*. The same term is found in Ugaritic in thirteenth-century Syria (*mlg*) and in Akkadian at Nuzi, in eastern Mesopotamia, in the fifteenth century (*mulūgu*).[29] It is clearly also comparable to Athenian *phernē*. The latter, however, seems to have been regarded as something entirely separate from the dowry, a trousseau of purely personal items.[30] In the Near East, it was regarded as a component of the dowry, although sometimes listed separately, and devolved together with the rest of the dowry. Furthermore, it could include any property, even land, although most commonly it consisted of slaves. The personal slaves Dolius and the daughter of Actor, who, we are told, were given to Penelope by her father before she entered Odysseus' house, fit into this category. Penelope's gift of a brooch to Odysseus before his departure may adumbrate further personal wealth from the same source (*Od.* 19.256–257). At the same time, these items could only account for a fraction of her dowry.

The content of the rest of the dowry is bound to remain speculative, in the absence of direct evidence. I suggest, however, that from the logic of its legal context we may deduce the presence of one very substantial asset. A

slight hint emerges from the epithet given to Icarius. Although a shadowy figure, who does not appear to be present in Ithaca nor to have any interest in his grandson's welfare, he is described as her greatly powerful father (*Od.* 1.276: *patros mega dunamenoio*). I would postulate that the power in question was political and that the primary asset of the dowry that Icarius gave Odysseus through his daughter Penelope was the kingship of Ithaca.

Odysseus' Kingship

The nature of Odysseus' rule over Ithaca has long been regarded as problematic. He is called a king (*basileus*) and his son Telemachus is acknowledged to have an hereditary right to the throne (*Od.* 1.386–387). Yet even when Odysseus is believed to be dead, Telemachus is unable to assume power. The position of Laertes is even stranger. It is not clear why and when he relinquished the throne to Odysseus, nor why he should not return to it in Odysseus' absence. Notwithstanding the emphasis on his old age, he is by no means incompetent to rule: he still manages the estate (*Od.* 16.138–145) and he would be able to address the assembly (*Od.* 4.739–741).

Odysseus' absence has left a power vacuum in Ithaca. In the words of Laertes: "wanton and reckless men now possess it" (*Od.* 24.282). These are the suitors, whose behavior Eurymachus in a key passage reveals to have had ulterior motives:

> But he now lies dead who was to blame for everything, namely Antinous; for it was he who set on foot these deeds, not so much through desire or need of the marriage, but with another purpose, that in the land of . . . Ithaca he might be king (*basileuoi*), and might lie in wait for your son and kill him. (*Od.* 22.48–53)

Finley described the situation as follows: "The king is dead! The struggle for the throne is open! Not, however, by straight violence; the suitors give Penelope the right to choose Odysseus' successor by choosing her spouse."[31] Therein lies the difficulty, not in the suitors' goal, but in the curious means that they adopt to achieve it. Finley found it strange that such a power should have been placed in the hands of a woman. There is nothing about Penelope, he noted, that could have won her this right as a personal triumph. In the absence of a rational explanation, Finley concluded that Homer is neither clear nor quite consistent about the legal picture.[32]

Halverson, on the other hand, denies that Odysseus had the functions of a king at all. In his view there was no throne, no office of king, indeed no real Ithacan state. It is true that Odysseus is called *basileus*, but "king" is a

mistranslation. Odysseus was the leading man of the region, but his position was one of status, not an office, a position based above all on wealth. As others in Ithaca are called *basileus* (in particular two of the suitors, Antinous and Eurymachus), he was merely the greatest *basileus* of the area. There was therefore no succession struggle; the suitors were contending for Penelope herself and nothing more. At most, acquisition of Odysseus' wife (and his wealth) would give the successful suitor something of Odysseus' prestige and Eurymachus' statement has to be interpreted in this light.[33]

Before considering these opposing positions, some remarks are in order on the nature of Homeric kingship, against the Near Eastern background. First, monarchy was the standard form of government throughout the ancient Near East, including Anatolia and the eastern Mediterranean. Oligarchies did exist but were rare and were generally regarded as a more primitive form of government.[34] Secondly, the same term was applied to any political ruler from a petty chieftain to an emperor.[35] Thirdly, that term still applied to a ruler when he himself was subordinate to another ruler. In a world of empires based often on loose vassalage or spheres of influence, there existed political hierarchies of kings.[36] As the dispatch of a diplomat from Mari in the eighteenth century cynically reports:[37]

> There is no king who is powerful by himself: ten to fifteen kings follow Hammurabi, the man of Babylon; as many follow Rim-Sin, the man of Larsa; as many follow Ibal-pi-el, the man of Eshnunna; as many Amut-pi-el, the man of Qatna; and twenty kings follow Yarim-Lim, the man of Yamhad.

Thus there is no problem in the existence of other kings (*basileis*) in Ithaca or in two of the suitors, Antinous and Eurymachus, being called kings. They could still be subordinate to king Odysseus.[38] Indeed, a hierarchical structure is the only possible explanation of Eurymachus' claim that Antinous was scheming to become *basileus*, when both Antinous and he himself already have that title (22.48–53; 18.64–65). A relationship of overlord and vassal also explains how the remote but powerful Icarius could have had Ithaca, together with its kings, in his gift.[39]

Homeric kingship is conceived of as monarchy: the incumbent rules alone, not as part of an oligarchy, and permanently, not for a limited term of office.[40] His function as a war leader is emphasized, of course, but he also has peacetime functions, which are listed in Agamemnon's offer of territory to Achilles:

> And seven well-peopled cities will I give him . . . , and in them dwell men rich in flocks and rich in cattle, men who will honor him with gifts as though he

were a god, and beneath his scepter will bring his ordinances to prosperous fulfillment. (*Il.* 9.149–156)

Behind the poetic hyperbole lie two very prosaic functions of government: the receipt of revenues and the administration of justice. The same two functions are attributed to Odysseus: in 2.230–234 we are informed that he did justice as a sceptered king, and in 23.354–358 he looks forward after his restoration to receiving revenues from the Achaeans. Odysseus' kingship may have been modest, but he had real political authority.

The question remains whether Odysseus' kingship is the true target of the suitors' machinations. Halverson argues that, notwithstanding Eurymachus' statement, the suitors cannot be after the kingship, since (a) they contemplate dividing Odysseus' *oikos* among all 108 of them, and (b) Penelope's marriage entails her departure from the house and thus her separation from Odysseus' estate.[41] Both arguments confuse personal property, Odysseus' *oikos*, with political privileges, Odysseus' kingship. Telemachus expressly distinguishes between them:

> It is no bad thing to be king (*basileuemen*). Straightway one's house grows rich and oneself is held in greater honor. However, there are other kings of the Achaeans in plenty in seagirt Ithaca, both young and old. One of these, it may chance, will have this honor, since noble Odysseus is dead. But I will be lord (*anax*) of our own house and of the slaves that noble Odysseus plundered for me. (*Od.* 1.392–398)

Eurymachus makes the same distinction:

> Telemachus, this matter surely lies on the knees of the gods, who of the Achaeans shall be king (*basileusei*) in seagirt Ithaca; but as for your possessions (*ktemata*), keep them yourself, and be lord (*anassois*) in your own house. (*Od.* 1.400–402)

In the same way, when Odysseus in Hades asks after his property, the answer he receives distinguishes between his lands (*temenea*), which Telemachus holds unchallenged, and his *geras*, which no one has (*Od.* 11.174–185). *Geras* in Homer is an entitlement: a benefit received as one's due either by way of reward for services rendered or by reason of one's position or status. The distinction is thrown into relief by Achilles' bitter criticism of Agamemnon (*Il.* 1.158–168). Whenever the Achaeans sack a city, Achilles receives as a reward for fighting in the battle a small share of the booty, whereas Agamemnon receives a much larger share, simply by reason of being the leader of the expedition. Both shares are called *geras*. Other examples of

a reward are the command of the Trojan armies, which Achilles mockingly suggests that Aeneas hopes to receive from Priam in return for slaying him (*Il.* 20.178–183), and the payment expected by a bath attendant (*Od.* 20.296–298). Entitlements arising from status or office are, for example, offerings to the gods (*Il.* 4.49) or the portion of meat due to a king (*Od.* 4.65–66). When Odysseus wishes for the nobles dining at Alcinous' court that each may hand down to his children his property (*ktemata*) and the *geras* that the people have given him (*Od.* 7.149–150), the former must refer to their personal estates and the latter to the feudal dues that they receive by virtue of their status. Accordingly, I interpret the *geras* in our passage simply as Odysseus' royal revenues.[42] He had expected Laertes and Telemachus to receive them on his behalf, but evidently they have been in abeyance since his departure.

The fate of the kingship is not therefore dependent upon the fate of Odysseus' personal estate. Failure to obtain Odysseus' personal estate would not prevent a suitor from exercising kingship from his own estate. Nevertheless, if the kingship were heritable in the same way as the *oikos*, we would expect whoever acquires Odysseus' *oikos* at the same time to acquire his kingship. Marriage to Penelope would be an irrelevancy. As Halverson points out, a departing widow would not take with her her late husband's estate, to which she had no inheritance claim.[43] She would, however, take with her her dowry. For this reason I consider that the dowry, rather than the line of male succession, was the source of Odysseus' kingship.

The transfer of political power through the medium of a dowry is attested both in ancient Near Eastern and Homeric sources. The Bible contains a striking example: in 1 Kings 9:16 we are told that when king Solomon married an Egyptian princess, the Pharaoh captured the city of Gezer and gave it as a dowry to his daughter. In the same way, Agamemnon offers seven cities as the main part of a munificent dowry that is to accompany whichever of his three daughters Achilles chooses to take in marriage (*Il.* 9.147–156).[44] A slightly different but equally cogent example is where Bellerophon marries the daughter of the Lycian king, who shares half the *timē* of his kingship with him (*Il.* 6.191–194). *Timē* cannot be honor in the abstract here; as Wagner-Hasel points out, it must refer to material privileges. The offer in this case is not separate territory, but co-regency.[45]

The Devolution of Penelope's Dowry

In both ancient Near Eastern sources and later Athenian law, we have seen the same general pattern of devolution of a dowry. It is subsumed into the

husband's assets; it resurfaces on his death; if the widow remarries the process is repeated; on the wife's death (or her husband's, if later) it is inherited by her children from both marriages. If we place Odysseus' kingship in the context of that pattern, a coherent picture emerges of the events on Ithaca and the actions and motivations of the principal protagonists.

The first question to be resolved is the curious position of Odysseus' father and son, neither of whom seems able to exercise kingship in his absence. Finkelberg explains their lack of a role—and the dependence of the kingship on marriage to Penelope—by positing an ancient tradition of dynastic succession through the female line, from mother to daughter. In each generation the only way a man can become king is by marrying the incumbent queen's daughter. The incumbent king's son can never qualify as his father's successor for reasons of incest. This would disqualify both Laertes and Telemachus.[46] Unfortunately, Finkelberg's logic is not supported by the text, which explicitly concedes to Telemachus at least a hereditary right to the kingship (*Od.* 1.386–387). There is in any case no need to presume the existence, or survival, of some anomalous, otherwise unattested system of succession alongside agnatic inheritance. The attested rules of dowry permit a different approach, which differentiates between the status of Laertes and that of Telemachus.[47]

If Odysseus had received the kingship of Ithaca as dowry from Penelope's father, then the inaction of Laertes is simply explained. Laertes cannot exercise kingship. He has no claim to reoccupy the throne, because he never was king. Laertes states that he once acted as lord (*anasson*) of the Cephallenians (*Od.* 24.375–378), but it is clear that he was only a military commander on that occasion.[48] *Anax* is a more flexible term than *basileus*, covering everything from a king to the owner of a dog (*Od.* 10.216, cf. 9.440). Elsewhere, Laertes is referred to as having been one of the elders (*Od.* 21.20), which would exclude a higher office.

Laertes was thus a military commander and a high-ranking member of society, but not a king. There are many references to him being wealthy (*Od.* 1.430; 15.483; 24.137; 24.206–207). His son Odysseus was also a military commander and gained great wealth in terms of herds of animals (*Od.* 14.96–108). Part of his wealth derived from booty, as Odysseus himself states: "Thus my house (*oikos*) at once grew rich" (*Od.* 14.230–234). Telemachus refers to the slaves that Odysseus plundered for him (*Od.* 1.398). The potential sources for the rest of Odysseus' personal property were capitalized revenues from his kingship and his father's estate. Since Laertes appears to have only one farm remaining from his great wealth (*Od.* 24.206–207), it is reasonable to presume that he had transferred the

residue to his son *inter vivos* (cf. *Od.* 24.337–344).[49] We are informed that Laertes was still overseeing the work on Odysseus' farmland in his absence (*Od.* 16.138–145), but apparently he had left the house to Penelope's management while Telemachus was still a child.

The role of Telemachus is more complex. Initially, his age holds the key to his position. Homeric kingship was based upon two conditions: strength and legitimacy. The former is exemplified by military leadership, often, as Finley points out, associated with the term *iphi* ("by force").[50] The second derives from rightful succession, symbolized by the scepter.[51] Odysseus had fulfilled the first condition by being a hero and military leader and the second from possession of his wife's dowry as husband and head of household.[52] Telemachus fulfilled the condition of legitimacy, as Antinous expressly acknowledges: "which thing (kingship) is by birth your heritage (*patroion*)" (*Od.* 1.386–387). Use of the term *patroion* might suggest that it was inherited from his father, but the term is used in the *Odyssey* in a general sense of property to which one is entitled (and may pass on to one's own issue), not in the strict sense of an inheritance from the father, as opposed to one from the mother. *Od.* 17.79–80 shows that it can include property acquired other than by inheritance, i.e., the gifts that Telemachus received from Menelaus. As will be seen below, a better explanation of the unfolding events is legitimacy based on Telemachus being heir to the kingship through his mother Penelope. Nonetheless, being a child, Telemachus could not yet fulfill the other condition, however legitimate his claim to the throne.

In Odysseus' absence, any one of the suitors might be able to seize the throne by force, but he would then be faced with 107 powerful opponents, each with an equal claim. To settle the matter among themselves, the suitors had to resolve the question of legitimacy. Their plan was as follows. Telemachus was heir to Odysseus' personal fortune and to the kingship through his mother, Penelope. He was, however, still a child. If a suitor married Penelope, he would become head of that household and would be entitled to control of her dowry, i.e., the kingship. Penelope's dowry was in theory heritable by her heirs, namely Telemachus and any issue of her second marriage with the successful suitor, but only on the death of the second husband (not of Penelope if she predeceased him). Furthermore, unlike an ordinary estate, kingship was indivisible—only one son could inherit it.[53] Consequently, the suitor who married Penelope would have a good chance of excluding Telemachus in his own lifetime and thereafter in favor of his own son. Telemachus would inherit only his father's personal assets.

This is the suitors' plan—summarized by Telemachus himself when he wryly notes that the suitors are eager, and Eurymachus most of all, to marry

Penelope and so acquire the *geras* of Odysseus (*Od.* 15.518–522). Wagner-Hasel notes the importance of this passage in showing that the transfer of *geras* must involve the female line. She considers, however, only two possibilities. The first is that it was inheritable through the female line, which she rightly rejects. The second is that Odysseus' marriage must have been uxorilocal, as in the case of Bellerophon, creating a quasi-familial relationship that enabled Odysseus to share in the privileges of the host household.[54] There is no indication whatsoever that Odysseus' marriage was uxorilocal nor, in my view, would it make the slightest difference if it were. Bellerophon was not absorbed into the privileges of his father-in-law's household in some mysterious way; he was assigned a discrete share, exactly in the manner of a dowry. *A fortiori* Odysseus on Ithaca, his homeland.

When the poem opens, the plan is in disarray. The suitors have two problems. First, Penelope by her deception over Laertes' shroud has successfully stalled them for three years. The suitors are attempting to counter her delaying tactics by devouring her son's inheritance—Odysseus' personal estate—thereby forcing her hand.

Secondly, Telemachus has reached manhood. He asserts himself before the suitors, ostensibly about their depredation of his personal estate, but all understand the implications for the kingship, hence Antinous' furious reaction:

> May the son of Cronos never make you king in seagirt Ithaca, which thing is by birth your heritage. (*Od.* 1.386–387)

Antinous makes clear that Telemachus lacks the necessary strength for kingship, at which point Telemachus retreats, ceding his right to the kingship and asserting his claim only to the paternal estate (*Od.* 1.392–398).

Telemachus' concession, however, turns out to lack credibility. For even if he excludes himself from the kingship, he remains able and willing to bar others from it, as long as Penelope refuses to marry and he allows her to stay in the house in which he is now head of household. The suitors' new tactic is therefore to separate Penelope from Telemachus. She must be persuaded to leave his house, taking her dowry, the kingship, with her.

Penelope, however, refuses to leave, a right accorded to a woman in her situation by both Near Eastern and Athenian law.[55] Telemachus, for his part, refuses to send her away. His excuse is that he would suffer a penalty payable to Icarius, divine wrath, and general censure, if he were to send her away against her will (*Od.* 2.132–137).[56] From the suitors' viewpoint, it looks like collusion between mother and son. For their mutual refusal once more gains time, which Telemachus could use to garner military support in order to end the occupation of his house.[57]

Such is the state of affairs when Odysseus makes inquiry of his mother in Hades (*Od.* 11.174–196). While purporting to ask about each of his family in turn—his mother, Laertes, Telemachus, and Penelope—Odysseus alludes to the political situation in Ithaca. He first posits two alternative scenarios:

a) His *geras* (which I have interpreted as his royal right to revenues) is still with Laertes and Telemachus. Their joint role does not presume political power; quite the contrary. The two together can only be acting as his representatives to receive or collect the revenues due, on the basis that his absence is temporary.[58] They would not be able to perform the other main peacetime role of a king—dispensing justice—on his behalf.
b) A stranger has his *geras*, because he has been given up for dead. Odysseus does not explain how a stranger, not acting as his representative, could have access to the royal revenues, without usurping his throne or Telemachus' right to it.

The process that he assumes, however, emerges from the second set of alternatives that he posits. Ostensibly concerning Penelope's marriage, they might be taken as regarding her personal status alone. In my view, however, they merely repeat the first set of alternatives as to the political situation, from the point of view of Penelope. Odysseus posits that:

i) Penelope remains head of household in his absence, and guardian of Telemachus. The assumption is that Odysseus' return is expected and the implication is that his throne is safe.
ii) Penelope has remarried. The new spouse would become head of household and thus be entitled to the royal revenues, through her dowry. Telemachus' ultimate right to the throne would not necessarily be excluded, because he is still Penelope's first heir.

Odysseus' questions thus reveal a naive optimism about the constitutional machinery of Ithaca. He supposes that Penelope's second husband will play the role of regent accorded to him by possession of her dowry, taking its income without prejudice to Telemachus' prospects of succession. He could not be expected to guess that a far uglier situation has developed, an oligarchic conspiracy to usurp the throne that will give the usurper the power to exclude Telemachus altogether. Nor does his mother's answer tell him the full truth, although it drops strong hints that all is not well. His mother answers his questions chiastically, dealing with each member of the family in turn: Penelope, Telemachus, Laertes, his mother. She reveals that:

a) Penelope remains loyal to him and unmarried. This good news should mean that his throne is safe.
b) No one has his *geras*. Here is an unexpected turn of events which hints at anarchy.
c) Penelope is no longer head of household, because Telemachus has reached manhood. He holds Odysseus' estate (*temenea*) unchallenged (*hekelos*), which is strictly speaking the truth, since the suitors have publicly conceded his right to inherit Odysseus' personal property, while consuming his inheritance. It implies that he is not so secure elsewhere, in particular in the matter of *geras*.
d) Laertes has withdrawn from public life altogether.

Faced with this impasse, the suitors decide once more to change their tactics. With some hesitation, they agree upon a more drastic step—the assassination of Telemachus. Although an unlawful act, it will not delegitimize their bid for the throne, since they regard legitimacy as a matter between themselves, not relevant vis-à-vis an outsider to their group.[59] Their first attempt proves unsuccessful, but it achieves the desired result. Penelope finally gives in to their demands and agrees in principle to marry one of them. Her motive is to save Telemachus' life, by removing him as a bar and potential rival for the kingship.[60]

Summary

Odysseus' kingship is mentioned explicitly only twice in the poem but in a way that frames the whole narrative of events in Ithaca. At the beginning, Telemachus' challenge to the suitors is interpreted as a bid for the kingship, and at the end, Eurymachus, on the point of death, reveals that marriage to Penelope was really a tactic to gain the kingship. In between, there is an indirect allusion when Odysseus inquires whether Laertes and Telemachus have his *geras*, which we have interpreted as royal revenues, and is informed that no one has them. Telemachus, however, reveals his awareness of the suitors' plan when he states that Eurymachus is the most eager to marry his mother and to have the *geras* of Odysseus (*Od.* 15.518–522).[61]

Otherwise, the issue of kingship is not raised. The protagonists give the impression that the suit is entirely about the charms of Penelope. Nonetheless, it is my view that kingship was the hidden agenda behind the struggle for Penelope, which remains the underlying, unspoken assumption of all until Eurymachus finally blurts it out.[62] The reason is that the kingship of Ithaca was not a direct, automatic consequence of marrying Penelope. Rather,

marriage was an essential pre-condition, a gateway to legitimacy that would enable a powerful noble to gain the acceptance of his fellow nobles and to push aside the legitimate but impotent heir to the throne.[63] The rules of dowry were well understood by Homer's contemporary audience; there was no need to spell out the implications. Devolution by dowry, however, was less direct and less certain than normal agnatic inheritance. Its vagaries provided convolutions for the plot, opportunities for moves and countermoves that added to its dramatic tension.

Notes

1. There is no fixed criterion for determining what constitutes a "society." If we separate Near Eastern sources by political units (i.e., by kingdom and reign, or even dynasty), then over the course of three thousand years the number runs into hundreds. At the other end of the scale, intelligible records are confined to no more than a dozen or so languages: Sumerian, Akkadian (which divides into Assyrian and Babylonian), Elamite, Persian, Hurrian, Hittite, Luwian, Urartian, Aramaic, Ugaritic, Phoenician, Hebrew, Egyptian. There was, however, no necessary correlation between society and language. A more practical, if rough, guide is by archives: the sources tend to cluster into archives covering not more than three generations. A few examples will illustrate the complexity of the situation. (1) Old Assyrian archives (eighteenth century) come almost exclusively from Assyrian merchant colonies in Anatolia, mainly Kanesh. Written in Assyrian, they inform us of the community of expatriate merchants, of the local Anatolian kingdom (language unknown), and of the capital city, Assur. (2) The city of Alalakh on the Orontes in Syria has produced two archives, from the eighteenth and fifteenth centuries, with several layers of destruction in between. The earlier layer uses the Old Babylonian dialect and the later Middle Babylonian with an admixture of Hurrian, reflecting its position as a vassal of Mitanni. The native language, unrecovered except for isolated terms, was a West Semitic dialect. (3) The archives from Elephantine represent a Persian garrison town in fifth-century Egypt. They are the records of Egyptians, Arameans, Jews, Persians, and sundry other ethnic groups, written in Aramaic and Demotic.

2. See Malul 1990; Muffs 1969; Westbrook 1990, 1994b, and 2000.

3. E.g., Burkert 1992 for the area of myth.

4. Westbrook 1992b [chapter 1 in the present volume—Eds.]. See also Westbrook 1988a [chapter 5 in the present volume—Eds.], 1990, 1999c [chapter 8 in the present volume—Eds.]; and Yaron 1974.

5. [Among anthropologists, the preferred term is "bridewealth." See, for example, Goody and Tambiah 1973.—Eds.]

6. The legal principles are discussed in Westbrook 1988b: 53–60.

7. Called "inchoate marriage" by Driver and Miles 1952: 249–250. LE 26: "If a man brings the 'bride-price' for the daughter of a man and another abducts her

and deflowers her without asking her father and mother, it is a capital offense—he shall die."

8. See Kraus 1969; Westbrook 1994b: 273–275; cf. MacDowell 1978: 91–93.

9. Compare the following clauses: "All this is the dowry of A daughter of B, which her father B has given to her and caused to enter the house of C for his son D [groom]" (BE 6/1 84:32–39; edition in Westbrook 1988b: 113); "A has given to B [groom] the dowry of his daughter C with C . . ." (*Nbn.* 243:10–12; edition in Roth 1989: no. 12: 10–12); "A [bride's mother] has given as dowry to B [groom] torques and rings (worth) 20 shekels of silver belonging to her daughter C" (*VAS* 6 61:5–8; edition in Roth 1989: no. 8); "[Groom speaking:] 'Your daughter A has brought into me in her hand . . .' " (Porten and Yardeni 1989: B2.6 [=Cowley 15], line 6).

10. NBL 12: "A wife whose husband took her dowry and she has no sons or daughters and her husband dies: a dowry as much as the dowry shall be given to her from her husband's estate."

11. LH 162: "If a man marries a wife and she does not provide him with children and the woman dies . . . , her husband shall have no claim to the woman's dowry; her dowry belongs only to her father's house." Cf. LE 17–18; MAL A 27; MAL A 29: "If a woman enters her husband's house, her dowry and whatever she brings from her father's house, or her father-in-law gave her upon her entry, are reserved for her sons; her father-in-law's sons have no claim."

12. LH 167: "If a man marries a wife and she bears him children and the woman dies, and after her death he marries a second woman and she bears children: after the father's death, the sons shall not divide according to mothers; they shall take the dowries of their (respective) mothers and divide equally the property of the father's house."

13. Harrison 1968: 46–49, 55–57.

14. III 17–20 (see n. 15 below); III 31–34: "if a wife dies childless, (the husband) is to return her property to the relatives (*epiballontes*)."

15. The position of the widow at Gortyn seems to have been closer to the Near Eastern model. According to III 17–20: if a man dies leaving children, if the wife so desires, she may marry, keeping her own property and whatever her husband may have given her.

16. In the case of Penelope it is unclear whether the recipient is herself, Telemachus, or her father and brothers, in the event that she returns to the family home. See Lacey 1966.

17. Lacey suggests that these were all uxorilocal marriages, "bride-price" applying only to virilocal marriages. The division of marriages into two rigid categories on the basis of a limited sample illustrates one of the problems that arise from creating a system out of the Homeric references alone: the danger of equating literary topos with legal category. The many references from the ancient Near East show that the connection between uxorilocal marriage and the absence of "bride-price" is legally speaking fortuitous. It is obviously more likely to occur in

such a marriage, where the groom tends to be poorer and his father-in-law is more interested in his services. It is a favorite topos of heroic stories, but even there the absence of "bride-price" is more apparent than real. When Saul offers his daughter in marriage to David, he informs him: "the king has no desire for 'bride-price' (*mōhar*) but for a hundred foreskins of the Philistines, to have revenge on the king's enemies," i.e., a deed of heroism (1 Sam. 18:25). David obliges and duly takes up residence in Saul's palace with his bride. Some years later, however, when he is embroiled in civil war with Saul's son, he is able successfully to claim that the latter hand over to him "my wife . . . whom I betrothed for a hundred foreskins of the Philistines" (2 Sam. 3:14). David's heroic deed thus had the legal effect of a "bride-price." Closer examination of the examples in Homer show that where the term "without 'bride-price' " is used, there is in fact a *quid pro quo*: Othryoneus offers Priam military service in exchange for Cassandra (*Il.* 13.363–382), and Agamemnon makes his offer to Achilles in anticipation of the same (*Il.* 9.144–148). Nor would the latter arrangement appear in any case to be uxorilocal.

18. Unless otherwise stated, the English translation of all passages cited from the *Iliad* and the *Odyssey* is that of Murray 1999 and 1995, respectively (revised by Wyatt and Dimock, respectively), Loeb Classical Library.

19. Finley 1955.

20. Snodgrass 1974.

21. Morris 1986. It seems to me that this is an abuse of ethnographic material, pressed into service to support an artificial construct. Morris admits the existence of a trousseau, an archaic version of later *phernē*, but wrongly attributes it to Laothoe in *Il.* 22.51. An archaic form of *phernē* does in fact exist in the poems and is discussed below.

22. If the wife dies childless, dowry and "bride-price" are to be returned to source. The law codes even provide for the one sum to be set off against the other, e.g., LH 164: "If his father-in-law has not returned the 'bride-price' to him, he (the husband) shall deduct the value of her 'bride-price' from her dowry and return her dowry to her father's house. For gifts from relatives, see Renger 1973. For gifts from the husband, see Ezekiel 16. For settlement on the groom, see NBL 8: "A man who gives his daughter to the son of a man and (the latter's) father assigns and gives his son property in his tablet, and the father-in-law assigns the dowry of his daughter and they write tablets in mutual agreement, they shall not alter their tablets."

23. *EA* 4:36–50; *EA* 1:61–62; *EA* 13, 14. Translations in Moran 1992.

24. E.g., *CT* 48 50:15–20: "A [bride's father] has received 10 shekels of silver, her 'bride-price,' has kissed (it/her?) and bound it in the hem of his daughter B—it has (thus) been returned to C [groom]" (translation from Westbrook 1988b: 122).

25. The term *anaednos* has the same function, indicating that the bride's father foregoes payment of *hedna* from the suitor; see Finley 1955: 182.

26. Perysinakis 1991; Wagner-Hasel 1988.

27. The ancient Near Eastern sources provide no direct evidence on this point. At Elephantine the father of a lady named Miphtahiah receives a bride-price for what appears to be her second marriage. See Porten and Yardeni 1989: 15 *ad* B2.6.

28. See Harrison 1968: 56–57.

29. See Levine 1968; Westbrook 1994b: 274–275.

30. Harrison 1968: 46–47; cf. Finley 1955: 183.

31. Finley 1979: 97.

32. Finley 1979: 101–102.

33. Halverson 1986; cf. Drews 1983: 129.

34. For example, among the semi-nomadic Kaskean peoples of Anatolia, whom the Hittites noted as not having kingship (Goetze 1967: 88). For the biblical narrator, the pre-monarchic period was a time of anarchy, when "each man did what was right in his own eyes" (Judg. 21:25). Oligarchy was characteristic of local, rather than central, government.

35. The earliest term, in Sumerian, is LUGAL, literally "big man." It continues to be used as a logogram in later cuneiform texts in other languages, e.g., Akkadian, Hittite. As an alternative, the logogram LÚ "man" is sometimes used, in the sense of head of household, the concept of king being of a householder writ large (e.g., Hammurabi is called "the man of Babylon"). The Akkadian term is *šarru*, Hittite *hassu*, West Semitic *mlk*, all explicitly made equivalent in lexical lists. In Old Babylonian legal documents, LUGAL is sometimes used as the logogram for "owner" (Akkadian *bēlu*). The Akkadian term *šarru*, however, is never used to mean private owner.

36. A clear terminological distinction is made between king and mayor (Akkadian *rabiānu*, *ḫazannu*), who was an official within the administrative hierarchy with a limited term of office, albeit head of the local council. The distinction is blurred in a significant manner in the Amarna Letters (fourteenth century), in correspondence between the Egyptian ruler and his vassals, the petty kings of Syria-Palestine. He refers to them as kings, while they often refer to themselves as his mayors (*ḫazannu*), in an attempt to suggest that they are a part of the internal Egyptian administration, which is patently not the case.

37. Dossin 1938: 117.

38. The poem ends with a solemn oath between the suitors' relatives and Odysseus confirming Odysseus as king forever (24.482–486, 546). This is the typical pattern of a vassal treaty from the ancient Near East. See, e.g., Parpola and Watanabe 1988: *passim*.

39. The *Odyssey* gives no other clues as to what the contemporary audience knew of Icarius. He was certainly not an invention of the poem but must already have existed independently in myth. Later legends about him, which connect him with Sparta or Acarnania, are unreliable. Of the many children that they attribute to him, only Penelope is mentioned in the *Odyssey*, while the later legends fail to include Penelope's sister, Iphthime, who is mentioned in the poem (4.797).

40. Agamemnon's leadership of the Trojan expedition is not relevant, being an ad hoc arrangement necessarily limited in duration and without territory. Agamemnon was, of course, a king in his own right, with his own kingdom.

41. Halverson 1986: 122–123.

42. Wagner-Hasel similarly interprets *geras* in this context as a material privilege, the right to receive honorific gifts and to exploit labor for work on the *temenos*, like the *timē* of which Bellerophon received a share (1988: 54–55). See below for her reasons for drawing this analogy.

43. Halverson 1986: 122.

44. Murray's translation (see n. 18 above)—"And seven cities will I give him"—might give the impression that this was a separate gift offered directly to Achilles, but there is in fact no (dative) pronoun in the Greek. The passage immediately follows (linked by *de*, not *kai*) the offer of dowry at large (lines 147–148). Of course, the dowry will pass into Achilles' possession on marriage.

45. Wagner-Hasel 1988: 54–55.

46. Finkelberg 1991: 307.

47. Postulating the remnants of an archaic matrilineal succession creates almost as many problems as it resolves. Finkelberg constructs a highly complex schema for heroic sources outside of Homer, involving a kingship by marriage rotating among patrilineal clans. Discussion of her system is beyond the scope of this article, but it might be worth investigating whether dowry could provide a solution to some of the cases she presents.

48. Cf. *Il.* 20.180–182: Achilles mocks Aeneas for hoping that by killing Achilles he will become *anax* of the Trojans: Priam will never grant him that privilege (*geras*), since the latter has sons and is not stupid. See also Wender 1978: 53–54.

49. This is a well-known procedure in the ancient Near East, if rare, for obvious practical reasons. One has only to think of the case of the Prodigal Son in the New Testament. More frequent is the assignment of an irrevocably fixed inheritance share, with actual possession postponed until after the testator's death.

50. Finley 1979: 96.

51. Cf. Agamemnon, *Il.* 2.100–108; Achilles, *Il.* 9.155–156.

52. In the false autobiography he gives to Eumaeus, Odysseus hints at his true situation: his own ancestry, not being the direct line of succession, got him only a small portion of land and a dwelling. "But I took to me a wife from a house that had wide possessions, winning her by my valor: for I was no weakling, nor a coward in battle" (*Od.* 14.199–212). At the end of the poem, Zeus reestablishes Odysseus' kingship on a new basis: an oath of loyalty sworn to him by the nobles (*Od.* 24.482–486, 546–547). This constitutional practice also has strong ancient Near Eastern parallels: see n. 35 above.

53. The co-regency of Bellerophon and his father-in-law is an exception made possible by their belonging to different generations. Bellerophon will ultimately succeed to the old king's throne anyway. Telemachus and the suitors, in spite of differences in age, belong to the same generation. They can only be rivals. In the

ancient Near East, co-regency is not attested, except possibly between Amenhotep III and Amenhotep IV (Akhenaten), i.e., father and son. Division between brothers meant division of the territory into two kingdoms.

54. Wagner-Hasel 1988: 56–58.

55. MacDowell 1978: 88–89; LH 172: "If her sons harass her (the widow) to make her leave the house, the judges shall investigate her case and impose a penalty on the sons; the woman shall not leave her husband's house."

56. As Wagner-Hasel points out, the sum payable is a penalty, not return of the dowry (1988: 45). The dowry would be returnable even if she left of her own free will. In LH 172 (see n. 55 above) the court imposes a penalty on sons who try to drive out their widowed mother; if she leaves of her own accord, however, she takes only her dowry with her.

57. He has two potential sources of support against the nobles: from the populace and from abroad (*Od.* 2.60–79, 314–317). His first attempt to garner support in the assembly is a failure—he does not even get a ship and crew in order to seek news of his father: *Od.* 2.1–257. Nonetheless, the threat to the suitors remains, particularly when they learn that he has assembled a crew after all.

58. Collecting debts for the government may have been a typical task allotted to a callow youth on his way to manhood: cf. Odysseus' mission in *Od.* 21.16–21.

59. For this reason also they can contemplate the illegal act of dividing the dead Telemachus' estate among themselves or awarding his house to the winner (by an ironic reversal in one version, as a dowry for Penelope: *Od.* 2.335–336). Nonetheless, some have scruples about killing a legitimate heir to the throne (*Od.* 16.400–401). There is also the fear that if Telemachus tells the assembly of the failed first attempt, he will be able to stir the people to act against them (16.371–386), thus fulfilling the condition of strength that earlier he had failed to meet. Eurymachus falsely denies Penelope's accusations (16.434–447).

60. Penelope engages in one final ruse: to recover some of the losses to Odysseus' personal wealth by beguiling precious gifts from the suitors. It is for this reason that Odysseus, observing her incognito, approves of her action (*Od.* 18.281–283).

61. Ironically, Eurymachus is the only suitor to enjoy any of Penelope's dowry, but it is the wrong part. He seduces Penelope's maid, Melantho, the daughter of her personal slave, Dolius (*Od.* 18.320–325).

62. It is noteworthy that Penelope's suitors are frequently described as the suitors "of the glorious queen" (*agakleites basileies*).

63. The order of events in Eurymachus' accusation of Antinous is significant: "that he might rule as king (*basileuoi*), yet might lie in wait for your son and kill him" (*Od.* 22.52–53). Interestingly, Athene urges on Telemachus a similar sequence: if his father is dead, he should marry off his mother and then kill the suitors (1.289–296).

CHAPTER THREE

Drakon's Homicide Law

Abstract

[The surviving fragment of Drakon's Homicide Law, which concerns unpremeditated murder, begins with the word *kai* ("and"). This article argues against all previous explanations of this anomaly and proposes an entirely new one, namely, that the provision preceding the word "and" did not concern murder at all, whether premeditated or not. Instead, based on the example of Near Eastern and biblical texts, it is argued that the missing element concerned unpremeditated violence that did not result in death.—Eds.]

Introduction

In 409/8 B.C.E. the Athenian government commissioned the transcription of Drakon's law of homicide onto a marble stele, to be erected in the Agora. The original, dating from the seventh century, had been inscribed on axones, which appear to have been four-sided rectangular wooden beams set horizontally in an oblong frame that could be rotated in order to read each surface (Stroud 1979: 41). The axones have of course long since perished, but a part of the marble stele that had survived in secondary use was recovered in 1843. It contains a preamble describing the commission to copy the law, the heading "first axon" and the first 60 or so lines of the text, although only the first third thereof is more than fragmentary and much of that is

[Originally published in E. Harris and G. Thür, eds., *Symposion 2007: Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, vol. 20 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2008), 3–16. Reprinted with permission of the publisher and the family of Raymond Westbrook, which we gratefully acknowledge.—Eds.]

heavily restored. The heading "second axon" has been deciphered towards the end of the extant text (Stroud 1968: 16–18, 58–60).

The main body of the recoverable text reads as follows (lines 1–20):

> Secretary: Diognetes of the Deme Phrearrioi
> Archon: Diokles
> Decree of the Council and the People, the prytany of Akamantis, Secretary: Diognetes, Chair: Euthydikos, motion of . . .
> Let the Registrars of the Laws transcribe the law of Drakon regarding homicide, after receiving it from the Basileus, with (the assistance of) the Secretary of the Council, on a marble stele, and let them place it before the Stoa Basileia. Let the Poletai subcontract in accordance with the law. Let the Hellenotamiai pay the money.
> First Axon
> And if without premeditation someone kills somebody, he is to be exiled. The Basileus shall find guilty of homicide either . . . or the one who plots. The Ephetai shall render a verdict.
>
> Pardon is to be granted, if there is a father or brother or sons, by all, or the one who opposes it shall prevail. And if these do not exist, pardon is to be granted by those as far as the degree of cousin's son and cousin, if all are willing to grant it; the one who opposes shall prevail. If not one of these exists, and he killed unintentionally and the Fifty-One Ephetai find that he acted unintentionally, let ten members of the phratry admit (him) if they wish. Let the Fifty-One choose the latter according to their rank. And let those who killed previously be bound by this law.

The Problem

The focus of this article is on the first sentence of the law itself (line 11 of the Greek text): "And if without premeditation someone kills somebody, he is to be exiled." And our concern is with the first word of the first sentence, the Greek *kai*, here translated literally "and." This simple conjunction has given rise to an immense amount of scholarly commentary, for the obvious reason that laws, or any other rational prose, for that matter, should not in logic begin with a copula.

Early commentators presumed that the law as copied was incomplete. Another law preceded it in the original, most probably the section of Drakon's code that covered intentional homicide. The obvious difficulty with this assumption is why it was not copied with the rest of the law. The explanation requires a further assumption, namely that the law on intentional homicide

was abolished between the time of Drakon and republication on the marble stele. As Stroud points out, there is no evidence whatsoever for such an assumption (1968: 35).

It is true that the emphatic position of the phrase "without premeditation" at the beginning of the sentence naturally suggests contrast to a preceding sentence emphasizing premeditation. In a thorough study of the use of *kai* in Greek laws, however, Gagarin has shown that it denotes continuity or new matter ("moreover"), not contrast. The appropriate designation of contrast between two rules is the far more common *de* (1981: 80–95).

A different approach, proposed by Stroud and followed by most recent scholars, is to translate the troublesome *kai ean* as "Even if." Thus the original law did not begin with a provision regarding intentional homicide at all. Rather, its opening provision, the one before us, equated the punishment for unintentional homicide with that of intentional homicide. A provision on intentional homicide either came later, in that part of the stele now lost (Stroud), or not at all, being sufficiently covered by the ellipsis in the opening provision (Gagarin).[1]

This interpretation raises as many difficulties as it resolves. Firstly, it is inherently unlikely that a law would begin with the statement "even if." That kind of extreme ellipsis is simply not the way that legislative prose is drafted, in any legal system on earth, ancient or modern. Gagarin has diligently searched the Greek corpus and managed to come up with only one dubious example, taken indirectly from a citation by Demosthenes (1981: 93–94).[2]

Secondly, it requires further assumptions regarding Drakontian homicide law, primarily that the most severe penalty for intentional homicide was exile, not death. The purpose of the law would have been to extend the harshest possible punishment, exile for murder, to unintentional killing. The death penalty, however, was certainly imposed for murder in later Athenian law, so a hardening of attitudes between the seventh and the fifth century would have to be presumed. It may well be that Drakon's reputation as a harsh lawgiver, whose laws were written in blood, was a fantasy concocted by later generations. But it is equally unlikely that Drakon was so far inclined in the opposite direction that he could not bear to contemplate the thought of the death penalty.[3]

The principle objection to this interpretation, however, is that it is a rationalization. It seeks to make an illogical sentence into something that could pass as a law, however awkward the result and however many distortions it introduces into the overall fabric of the legal system.

The Context of Drakon's Law

Our intention is to approach the problem from a completely different angle. We take the opening *kai* to be a simple connective, which means that there was a provision that preceded the law on unintentional homicide in the original document and that provision was omitted in the extant copy, for good reason.

To identify the missing provision, it is necessary to place Drakon's law in its historical context, not only within Greek law but also in the world from which ancient Greek law developed. It is necessary, to borrow a phrase from the grammarians, to discover the deep structure of Drakontian jurisprudence.[4]

The style and content of the present excerpt from Drakon's legislation reveals it to belong to a well-known literary legal genre: the law code. Within Greece, early examples are found in inscriptions from Crete, the most complete being the Code of Gortyn.

The genre, however, has a long ancestry in the Mediterranean basin and the Near East. The most famous example dates back to the eighteenth century B.C.E., namely the law code of king Hammurabi of Babylon. Codex Hammurabi (CH) is in fact only one of seven codes in cuneiform script that have so far been recovered from the Near East. Two Sumerian codes from southern Mesopotamia are earlier: Codex Ur-Namma (CU) from the city of Ur and Codex Lipit-Ishtar (CL) from the city of Isin date to the twenty-first and nineteenth centuries respectively. A code in Akkadian from Eshnunna (CE), a city to the north of Babylon, dates to about thirty years before CH. Moving forward in time to the Late Bronze Age, the Middle Assyrian Laws (MAL) from Assyria are thought to have been written between the fourteenth and eleventh centuries and the Hittite Laws (HL) from the Hittite capital Hattusha in Anatolia are preserved in several versions covering a slightly earlier time span. Finally, a small excerpt of a code, the Neo-Babylonian Laws (NBL), comes from sixth-century Babylonia.[5]

In the first millennium, the Hebrew Bible furnishes us with three law codes. They appear as discrete clusters of laws that have become embedded in the Pentateuchal narratives: the Covenant Code, a block of laws in Exodus 21 and 22:1–16, the Deuteronomic Code, a similar block in Deuteronomy chapters 21 and 22, and the Priestly Code, which consists of a few fragments found scattered in the books of Leviticus and Numbers. The Deuteronomic Code is generally dated to the reign of king Josiah in the seventh century and the Priestly Code to the Babylonian Exile of the sixth century or the subsequent Persian period. There is no consensus on the date

of the Covenant Code, with opinions ranging from the ninth to the fourth century. The final member of this genre is the Roman Twelve Tables, traditionally dated to 450 B.C.E.[6]

The characteristics that mark these sources as belonging to a single genre, notwithstanding the immense distances of time and space that separate them, lie in both their form and content. The predominant form employed by all of the law codes is the casuistic sentence, namely a conditional clause stating the circumstances of a hypothetical case, followed by a clause stating the legal consequences. For example: "If a man knocks out the eye of a man, his eye shall be knocked out" (CH 196).

The predominant subject-matter of all the codes is everyday law as would be practiced in the courts. Their similarity in content, however, runs much deeper. Many of the same cases keep recurring in different codes, not always with identical facts or with the same solution, but close enough to show that they drew upon the same situations and the same legal principles. For example, the case of an adulterer caught in the act is found in MAL, HL, and the Gortyn Code, with variations in the punishment inflicted, but all with some discretion in punishment allowed to the husband. The punishment of theft by payment to the owner of a multiple of the thing stolen is found in CH, HL,CC, and the Twelve Tables. The case of the burglar caught by night, who could be killed on the spot, assumes the character of a literary *topos*, being reported in CE, CC, XII Tables, and, apparently, the laws of Solon (as reported by Demosthenes, *Against Timocrates* 113).

Closer examination of the recurring cases points not merely to a literary connection by copying or emulation but to a much deeper underlying intellectual tradition. It is revealed through the process of composition of a casuistic code. The starting point was a legal case. It may have been a real case judged by a court, or it may have been drawn from a well-known incident in epic or historical legend (which were regarded as factual events), or it may have been a purely fictitious case invented for the sake of argument. Preferably it was a case that involved some delicate or liminal legal point that would provide food for discussion and throw into relief more commonplace rules. The case was stripped of all non-essential facts (e.g., the names of the parties, circumstances not relevant to the decision), and turned into a theoretical hypothesis, with its legal solution, thus forming an individual casuistic law.

That was by no means the end of the process. The law codes are not a concatenation of individual laws or even associated laws; rather, they are composed of sets of theoretical discussions. Once a law had been created, details of its hypothetical circumstances were then altered to produce a se-

ries of alternatives that would, for example, change liability to non-liability, or would aggravate or mitigate the penalty. That set of variations around a single case formed a scholarly problem, which could be used as a paradigm for teaching or for further discussion.

A good illustration of the ancient methodology is the problem of the goring ox in CH:

> 250. If an ox gores a man while walking down the street and causes his death, that case has no claim.
> 251. If a man's ox is a gorer, and his local council has warned him that it is a gorer and he does not dock its horns and does not check his ox and it gores the son of a man and causes his death, he shall pay thirty shekels of silver.
> 252. If a man's slave, he shall pay twenty shekels of silver.

If we take the central paragraph as the original hypothesis, we can see that it has been varied along two axes: (1) circumstances in which there is no liability; (2) the status of the victim (which changes the level of liability). Many more variations could be imagined.

Over time, a canon of traditional problems emerged that was passed on from school to school and from society to society, through several millennia. Where the same problem emerges in a number of law codes, two features of the academic method used in creating those codes ensured that the content would be similar and yet different. Those features may be characterized as abridgement and creativity.

It can be seen from the example of the goring ox that the discussion is by no means complete. The casuistic method precludes comprehensiveness, but even so, the three paragraphs in CH leave it clear that many intermediate situations were known but were excluded for the sake of brevity. All the law codes are equally summary in their presentation of scholarly problems. They stake out the parameters of a problem rather than cover all its facets. Thus when we find a variant in one code but not in another, it does not necessarily mean that the variant was unknown to the latter code.

On the other hand, the discussion in one school may lead to a line of variation not pursued elsewhere. Having a fund of well-known problems at their disposal, intellectual circles could refer to them obliquely, while they adapted and extended them by logical extrapolation.[7] (This is not to be confused with different rulings on the same facts, which is always possible in different legal systems.)

These features are well illustrated by the treatment of the goring ox problem in the two other codes in which it is found.

Codex Eshnunna

53. If an ox gores another ox and causes its death, both ox owners shall divide the price of the living ox and the carcass of the dead ox.
54. If the ox is a gorer and the local council has warned its owner but he has not docked its horns and it gores a man and causes his death, the owner of the ox shall pay 40 shekels of silver.
55. If it gores a slave and causes his death, he shall pay 15 shekels of silver.
56. If a dog is vicious and the local council has warned its owner but he has not guarded his dog and it bites a man and causes his death, the owner of the dog shall pay 40 shekels of silver.
57. If it bites a slave and causes his death, he shall pay 15 shekels of silver.
58. If a wall is threatening to fall and the local council has warned its owner, but he does not strengthen his wall and the wall collapses and causes the death of a man's son, it is life; order of the king.

Exodus 21

28. And if an ox gores a man or a woman and they die, the ox shall be stoned and its flesh not eaten but the owner of the ox is free of liability.
29. If the ox is a previous gorer and its owner is warned but does not guard it and it causes the death of a man or a woman, the ox shall be stoned and its owner shall be killed.
30. If ransom is demanded of him, he shall pay for saving his life whatever is demanded of him.
31. If it gores a son or a daughter, the same rule will apply to him.
32. If it gores a male or female slave, he shall pay their owner 30 shekels and the ox shall be stoned.
33. And if a man opens a pit or digs a pit and does not cover it and an ox or an ass falls in it,
34. the owner of the pit shall pay, he shall indemnify its owner and the carcass is his.
35. And if a man's ox gores his neighbor's ox and it dies, they shall sell the living ox and divide its price and they shall also divide the carcass.
36. Or if he was warned that it was a previous gorer and its owner did not guard it, he shall pay ox for ox and the carcass is his.

Comparing all three, we see that the case of an ox goring an ox is found in the biblical code and CE, but is missing from CH. It is unlikely that Hammurabi's draftsmen were unaware of this possibility, found in an earlier and a much later code that have no historical connection between them. The same applies to CE, which omits circumstances where the owner would not be liable, considered by CC and CH. On the other hand, CE's extension

of the analogy, applying the same principles of liability to a savage dog but not to a tumbledown wall, seem to be its own invention, especially since it brings in a local decision to support the latter ruling.

The purpose of this long digression into the jurisprudence of the ancient Near East is to avoid a superficial juxtaposition of cross-cultural parallels. Instead, we would emphasize structural relationships between elements within a very long tradition, notwithstanding the complexity that longevity and transmission in themselves engender in the relationship between different cultures.[8]

The Greek law codes stand on the very edge of the Near Eastern tradition and on the cusp of an intellectual paradigm shift that was to transform the concept and function of a law code. The predominantly casuistic Bronze Age codes of Mesopotamia belonged to the realm of scientific inquiry, while legislation was a separate genre, in the form of predominantly apodictic decrees and edicts. The Iron Age codes of the Mediterranean—Hebrew, Roman, and Greek—begin to combine the two, until the code itself becomes a legislative instrument. Thus Drakon's law could well have been a legislative act, while drawing on the features of the law code tradition.[9]

Were we to seek a simple parallel to Drakon's law, we need look no further than near-contemporary laws from the Bible. The distinction between intentional and unintentional killing, in connection with the issues of asylum and exile, is made in no less than three laws in the Pentateuch, one from each of its law codes.[10]

Exod. 21:12–14 reads:

> He who strikes a man and kills him shall be put to death. As for one who did not stalk him but God forced his hand, I shall establish a place whither he may flee. But if a man plots against his neighbor to kill him with guile, from my altar you shall take him to die.

At first sight, the biblical parallel neatly fills in the missing elements in the Drakontian law, supporting Stroud's surmise that a law on intentional homicide followed the law on unintentional homicide, being inscribed on a part of the stele that is now lost. Unfortunately, it does not solve the problem of the word *kai* at the beginning of the Greek law, whether we translate "and (if)" or "even (if)." On the first hypothesis, if the Drakontian law began with a general statement on homicide like the biblical law, then the copyists would surely have copied it. On the second, the pattern of the biblical law, with its contrast between asylum for unintentional homicide and death for intentional homicide offers no support for the legal framework required by the translation, namely exile as a universal penalty. As Gagarin points out,

the phrase "even if" makes reiteration of the law on intentional homicide unnecessary: the phrase takes as a matter of common knowledge that the law is identical to that of unintentional homicide (1981: 101–102).

The usefulness of the biblical law lies in its showing that Drakon did not invent the distinction between intentional and unintentional homicide or the penalty of exile. At the very least, these elements were part of a common legal culture of the Mediterranean basin in the first millennium B.C.E. The "deep structure" of Drakon's law makes it highly unlikely that its idiosyncrasies can be explained as deriving from the special facts of an actual contemporary case to which the lawgiver was responding, as Thür has proposed (1985: 509). On the contrary, it is legitimate to look beyond Athens, indeed, beyond Greece, for a solution to our problem, even if this particular parallel failed to provide one.

A New Theory

It is a common assumption of all commentators on the Drakon inscription that the original inscription from which it was copied was exclusively concerned with homicide. There is no demonstrable basis for that assumption.

We have no idea of the length of the original inscription on the axones, or how many axones there were, for that matter. Plutarch's reference to the eighth law on the thirteenth axon of Solon indicates that a single axon could contain far more than a single law (*Solon* 19.4). Drakon's monument could have contained laws on many different subjects, just like the Gortyn Code. Later sources refer to laws of Drakon on various matters, notably adultery, theft, oaths, and idleness, but we are informed that Solon abolished all of Drakon's laws except for those on homicide, which would explain why they alone would be of interest to the Athenian commission of 409/8.[11]

The extant fragment comprises highly specialized rules on certain narrow aspects of homicide, mostly pardon by the relatives for an unintentional killer and certain modalities of the killer's exile. There are many other aspects of homicide that could have been regulated, such as intentional homicide, justified homicide, indirect causation, procedural matters, etc., etc. In the casuistic law code tradition, not all the rules regarding one topic (or what we would regard as one topic) are necessarily dealt with in a single block; they may be scattered in different parts of the code. If that were the case with Drakon's law, even to a small degree, the commission would have had to comb the text looking for passages to extract.

Schmitz argues that the use of the singular "law" (*nomos*) in the preamble to the inscription infers that Drakon's law only concerned homicide

(2001: 17). The preamble, however, tells us only what law was to be copied; it says nothing about the source from which it was copied. If we are to rely on inferences, then the headings "first axon" and "second axon" inserted by the copyist are powerful evidence for the opposite thesis. The use of such references makes much more sense if one is presenting excerpts from various locations in a longer source than if one is simply copying a text in its entirety.

If the copyist were merely going through Drakon's inscription and extracting the sections on homicide and the section before the present law on unintentional homicide located on the first axon did not concern homicide, then clearly he would not have bothered to copy it. At the same time, that preceding law must have had sufficient connection with the homicide law for the latter to begin with the word "and."

What then was the subject of the missing law? The law code tradition suggests an answer. It provides compelling evidence not from an isolated parallel but from a canonical legal problem attested in several codes. Our starting point is a Mediterranean code roughly contemporary with the era of Drakon. Exod. 21:18–19 from the biblical Covenant Code reads:

> If men quarrel and a man strikes his neighbor with a stone or a fist and he does not die, but falls to his bed: if he rises and walks abroad on his stick, the striker is clear of liability; he shall only pay for his idleness and ensure his medical treatment.

Strikingly modern in its emphasis on compensation and rehabilitation, this law is a singular exception to the standard principles of redress for physical injury. They are best summarized in the Roman law of the Twelve Tables (8.2):

> If he destroys a limb, unless he compounds with him, there shall be like for like.

This is the famous talionic law, which is found not only as a scholarly problem but constitutes a literary *topos* in its own right. The biblical version is (Exod. 21:24–25):

> An eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burning for a burning, a wound for a wound, a lash for a lash.

In case the meaning should be unclear, the law from CH that we have already seen is unsparingly literal (196):

> If a man knocks out the eye of a man, his eye shall be knocked out.[12]

Two elements of the compensation law in Exodus indicate why it is an exception to the talionic principle. Firstly, the injury is not permanent and appears to leave no visible mark. This is not stated expressly, but emerges

from the detailed description of the consequences. Secondly, it was not intentional, or at least not premeditated: it arose from a quarrel and did not involve a weapon, merely a fist or stone that was picked up in anger.[13]

Moving backwards in time, HL present the same case, with some variations:

> 10. If someone wounds a man and makes him ill, he shall nurse him. He shall give a man in his place and he (the latter) shall work in his house until he is well. When he is well, he shall give him six shekels of silver and pay the doctor's fee.

The question of intention is not mentioned, but that is no indication that it was not a factor in the law or that the draftsman was unaware of the question. For the third and earliest source on this same problem focuses directly on the mental element. CH 206–208 also add a further variation of great significance:

> If a gentleman strikes a gentleman in an affray and inflicts a wound on him, that gentleman shall swear, "I did not strike knowingly" and shall pay the doctor.
> If he dies of his blow, he shall swear, and if he (the victim) is the son of a gentleman he shall pay 30 shekels of silver;
> If he is the son of a commoner he shall pay 20 shekels of silver.

The discussion is therefore less concerned with the temporary nature of the injury but makes abundantly clear that the lack of intention (to cause injury when he punched someone in a fight) is a key mitigating factor. It then extends the discussion of unintentional wounding to that of unintentional homicide.

If Drakon's original law derived from this traditional problem, then the law on unintentional homicide would naturally have followed a law on unintentional injury. Of course, this extension of the traditional problem on injury could reflect creative jurisprudence on the part of CH, restricted to its own legal system. One final piece of evidence demonstrates that, to the contrary, it was part of the canonical discussion.[14]

It will be recalled that the biblical version of this law states that the injured man "does not die, but falls to his bed." It is a seemingly superfluous piece of negative information, since we are told in graphic terms how the victim makes a recovery. Its inclusion reveals that the biblical draftsman was well aware of a variation in the standard problem leading the discussion into the realm of homicide, but chose not to include it. It was a case of abridgement, not creativity. If the traditional problem also informed

Drakon's law, it would have regarded unintentional homicide as a legitimate component in the discussion of unintentional injury.

Summary and Conclusions

The commission charged with copying Drakon's law of homicide extracted from the existing monument all relevant rules on homicide that they found and excluded any connected rules that were on other subjects. Accordingly, they excluded a section on injury that had preceded the first excerpt that they found, leaving only the provisions on homicide.[15]

The commissioners were highly pedantic in the execution of their task. They copied; they did not revise. As has been pointed out, they even copied obsolete rules that could no longer be valid.[16] Taking their orders literally and pedantically, they copied the homicide section as they found it, with the initial "and" (*kai*), even though it served no particular purpose in its new context.[17]

Furthermore, if the present text on the marble stele is a digest of disparate rules on homicide extracted from various places in the original source, then a more radical possibility emerges. The twenty or so decipherable lines of law that we have may themselves not represent a single law but several laws juxtaposed. This would explain certain anomalies that have disturbed commentators.

For example, the first sentence of the law (line 11), which has been the subject of our present inquiry, may have been separate from what follows, being a mere supplement to a law on unintentional wounding. The next rule (lines 11–13), which seems to introduce premeditated homicide in an inappropriate context, would have been a later section concerned essentially with jurisdictional matters. The rules on pardon (lines 13–20), which use a different term for unpremeditated (*akon*), would again have started life as an independent rule.

If the first rule that the commissioners came across on the axon was merely a brief remark extending a discussion of unintentional wounding to unintentional homicide, then it is all the more understandable why they should have left the sentence in its entirety, including its initial *kai*.

Notes

Earlier versions of this study were presented as lectures to the Classics and Near Eastern Studies Departments of the Johns Hopkins University, the Institut für Römisches Recht of the Karl-Franzens-Universität Graz, and to the 2007 Symposion at Durham University. I am grateful to all the participants for their useful

comments, criticisms, and suggestions. Responsibility for the ideas expressed in this text remains, as always, with the author.

1. Stroud 1968: 34–40, summarizing the earlier literature; Gagarin 1981: 65–144; see Schmitz 2001: 20–22 for a recent summary.

2. Dem. 24.39, where, as Lateiner points out, "its probable meaning emphasizes the retroactive nature of the law in question. In this quotation, *kai ei* does not assume a previous law or subsume a current one" (1983: 406).

3. A distinction between execution and vengeance (or self-help), as made by Gagarin (1981: 119) and Schmitz (2001: 28–29) is specious. Vengeance was not lawless feud; it was a legal right supported and regulated by the law. Whether the killer was killed by a public authority or by a private individual in pursuit of a legal right, it amounts to execution of the death penalty.

4. Failure to recognize historical depth is a conspicuous feature of the "historical" approach, whereby some contemporaneous political event is sought out as the cause and focus of the legislation. Thus Humphreys (1991) tries to link Drakon's law to a putative political dispute arising out of the wrongful execution of Kylon's supporters some 15 years earlier. Inevitably, the law's universal provisions are tied to a Procrustean bed to make them fit the specific circumstances of the event. For example, "non-intentional" homicide is hardly appropriate to the deliberate execution of a rebel, but Humphreys stretches the term to cover self-defense, lack of personal animosity, and acting under orders (p. 22). For further criticisms of Humphreys' thesis, see Gagarin 2007: 4–5.

5. A convenient edition and translation in English of the extant cuneiform law codes is available in Roth 1997. [See chapter 10 in the present volume.—Eds.]

6. The following discussion summarizes a series of published studies by the author, in particular Westbrook 2003b: 9–10, 16–24, reviewing the nature of the Near Eastern codes and the relationship between them, and Westbrook 1988a, which discusses their connection with the Greek and Roman codes [chapter 5 in the present volume—Eds.].

7. While a creative process cannot always be proved in individual cases, its existence in principle is demonstrable, because certain codes have characteristic obsessions. For example, all codes are concerned with status, mostly as between free men and slaves, sometimes with sons as an extra variant. CH goes further, in considering again and again variations of class between free men. Again, most codes vary punishment for theft according to the type of animal stolen, e.g., an ox or a sheep, but the HL provisions on theft list in obsessive detail different species, grades, and ages of animals. Some codes trace rights through several degrees of affinity, but Gortyn lists every possible relative, however distant, who may be entitled, a trait echoed by Drakon's law regarding the relative who is entitled to pardon a killer.

8. An example of the complexities of transmission is the word *theoi* that heads many Greek legal inscriptions. Pounder (1984) has traced the origins of this enigmatic heading through earlier Greek inscriptions back into the ancient

Near East, into the extensive curses and blessings that are common at the end of inscriptions such as CH.

9. See Westbrook 1989a, 2000. It is important to note that "casuistic" is a mode of thinking more than a stylistic feature. None of the law codes comprise solely conditional clauses, although some are purer than others. The Mediterranean codes of the first millennium (with the notable exception of the Code of Gortyn) contain a high admixture of apodictic commands, which may reflect the shift from academic treatise to normative legislation.

10. Exod. 21:12–14 (Covenant Code); Num. 35:9–34 (Priestly Code); Deut. 19:1–13. Josh. 20:1–9 contains a further version of the same law. The relationship between these laws, each of which differs in detail, is the subject of considerable debate among biblical scholars. See Barmash 2005: 71–93.

11. *Ath. Pol.* 7.1; Plut., *Solon* 17.2. Schmitz (2001: 9–16, cf. Humphreys 1991: 18–19) argues that Drakon's laws concerned only homicide and that what apparently were other offenses in fact all related to homicide. That might be arguable for adultery, where the husband who kills the lover caught *in flagranti* with his wife is not guilty of murder, but to assimilate theft of fruit and vegetables or a fine for breach of oath into homicide requires special pleading.

12. Some law codes have fixed payments instead of *talio* (e.g., CE 42–46; HL 7–9, 11–16), while CH has a mixture of both. We have argued elsewhere that these represent fixed ransom in lieu of revenge (Westbrook 1988c: 39–77).

13. There is a striking resemblance to classical Athenian *aikeia*, which was a private claim for compensation for physical assault arising from an altercation, as opposed to deliberate wounding (*trauma ek pronoias*): Dem. 47.45–47, 47.64. See MacDowell 1978: 123; Cohen 2005: 215–216.

14. CE 47-47A most probably involve the same problem, with the same extension to homicide, but the terseness of the discussion and uncertainties in the terminology make the evidence of these paragraphs unreliable: If in a fight(?) a man injures(?) a man, he shall pay 10 shekels of silver. If in a brawl a man causes the death of the son of a man, he shall pay 40 shekels of silver.

15. It has been suggested that ll. 33–34 in fact contained a section on injury, thereby making it unlikely that one had existed before the opening paragraph (oral communication of Prof. G. Thür). Since only a fragment remains, any reconstruction is speculative, but it seems to us unlikely that a text otherwise entirely concerned with homicide should suddenly discuss minor injury. The lines could well have concerned the same homicide mentioned in ll. 34–35. More important is the fact that they were not concerned with substantive liability but with an entirely different legal issue: that of evidence. The statement regarding the one who initiated the violence ([. . . *archon*]*ta cherōn a*[*dikon* . . .]) points to an evidentiary presumption for the purpose of allocating culpability.

16. E.g., the retroactive clause in lines 19–20. See Stroud 1968: 50–51. The pedantry of the copyists is well illustrated by a companion piece to the present inscription, where the damaged original was transcribed with such caution that

the stonecutter preferred to carve three pairs of points to indicate an illegible word rather than make the most obvious restoration: Lewis 1967: 132. (I am grateful to Prof. P. Rhodes for bringing this text to my attention.)

17. It should be emphasized that this hypothesis could be constructed independently, without mention of the ancient Near East. What the Near Eastern evidence does is to place the hypothesis in a tangible context and thereby lift it out of the realm of interesting speculation.

CHAPTER FOUR

Barbarians at the Gates

Near Eastern Law in Ancient Greece

Abstract

[Ancient Greek writers frequently attribute a foreign origin to certain Greek laws, usually through the agency of a named lawgiver who traveled abroad and brought home the laws he considered worth adopting. This article offers an alternative account of foreign influences on Greek law, arguing for a concept of a legal *koinē* and a more fluid model of cultural exchange than the ancient authors imagined.—Eds.]

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1. Greek sources record that in the early history of Greece certain laws were of foreign origin. The accounts are mostly from Hellenistic authors such as Plutarch and Diodorus, but classical authors such as Herodotus, Isocrates, and Aristotle also occasionally mention foreign influences on Greek law.

Where the process of legal transplantation is mentioned, it follows a set pattern: a named lawgiver (*nomothetes*), usually on a trip abroad, selects a few local laws that he finds useful and incorporates them into his native system. It is essentially the same pattern as for inner-Greek borrowings. Where the foreign source is Near Eastern law, the target of the visit is preponderantly Egypt. Plutarch tells us that Lycurgus, for example, on his travels

> came first to Crete. Here he studied the various forms of government and made the acquaintance of their most distinguished men. Of some things he heartily approved, and adopted some of their laws, that he might carry

[Unpublished lecture delivered at Miami University, Oxford OH, March 2008. Reprinted with permission of the family of Raymond Westbrook, which we gratefully acknowledge.—Eds.]

> them home with him and put them in use; for some things he had only contempt. . . . From Crete, Lycurgus sailed to Asia, with the desire, as we are told, of comparing with the Cretan civilization, which was simple and severe, that of the Ionians. . . . The Egyptians think that Lycurgus visited them also, and so ardently admired their separation of the military from the other classes of society that he transferred it to Sparta. . . . And this assertion of the Egyptians is confirmed by some Greek historians. (*Lycurgus* 4.1, 3, 5)

Likewise, Diodorus writes that the Egyptians attribute their law of contract to a king Bocchoris (= Bakenranef, 24th Dynasty, eighth century B.C.E.) and continues:

> In the case of debtors he ruled that the repayment of loans could be exacted only from a man's estate, and under no condition did he allow the debtor's person to be subject to seizure. . . . And it appears that Solon took this law also to Athens, calling it a disburdenment (*seisachtheia*), when he absolved all the citizens of the loans, secured by their persons, that they owed. (1.79.1, 3)

Diodorus says of Charondas, another legendary lawgiver:

> He, after examining the legislation (*nomothesias*) of all peoples, singled out the best principles and incorporated them in his laws (*nomous*). . . . (12.11.4)

The standard account of foreign borrowing makes the following assumptions:

a) a legal system consists essentially of legislation or precedent, that is, rules created by a conscious act of will by a lawgiver;
b) a legal system is hermetically sealed from the outside; foreign rules can only enter by a decision to make an exception and open the gates;
c) foreign laws are not received; they are taken. The lawgiver adopts them through this conscious process.

2. These classical accounts may accurately reflect the situation at the time of the authors, namely, from the fifth century B.C.E. onward. In particular, the Hellenistic authors' description of the process of borrowing reflects Hellenistic thought and is based on the structure of Hellenistic legal systems. For the period that these sources purport to record, however, prior to the fifth century, they are completely misleading. Foreign elements in early Greek law were not imported by Greek lawgivers and are unlikely to have come mainly from Egypt.

We have copious evidence of the presence of Near Eastern law in early Greek law, dating back at least to the Late Bronze Age. Our evidence is embedded in Greek sources from later as well as earlier periods, from Linear B to the Hellenistic historians. It also derives in part from a parallel presence in early Roman law, of necessity recorded in later sources. The received law thus survived into later sources. Those sources do not, however, identify the laws in question as being of foreign origin. Nor do they contain, in consequence, any evidence of the process of reception or of the date of reception. The reason is that their absorption followed the pattern that obtained among the societies of the ancient Near East (ANE) and reflects a different structure of legal system from *classical* Greek law and a different way of looking at the law. These features were, however, shared by *early* Greek law.

3. The legal systems of dozens of polities in the ANE are now known to us. The sources—mostly in cuneiform, but also in hieroglyphic, hieratic, and alphabetic scripts—date from the mid-third to the mid-first millennium B.C.E. The law that they represent was overwhelmingly traditional law of unspecified origin, with very little legislation or precedent. For the most part the existence of legal rules is assumed, not stated. Legal sources do not expound legal principles or general rules, only the decision in a particular case. There is no hint of the legal reasoning behind a decision. There was a known corpus of law but its parameters were amorphous, not fixed.

4. The legal systems of the ANE were not hermetically sealed. On the formal level, there was little sense of the law being exclusively for citizens of the state: there were no exclusive courts and only a few rules that applied to citizens alone. Foreign residents are found as full participants in legal life. Even in the Assyrian trading colonies in eighteenth-century Anatolia, which made treaties with the local rulers granting them extraterritoriality, local inhabitants are found as contracting parties with Assyrians, and as marriage partners. The same was still true of the Persian military garrison at Elephantine in Egypt in the fifth century. On the conceptual level, the amorphous nature of the substantive law allowed the easy penetration of foreign ideas.

5. While individual legal systems contained many different rules and institutions, there is an astonishing commonality in their underlying legal structure. It is reflected at the level of unspoken legal principles and to some extent even in specific rules. It is possible to speak of a legal *koinē* that remained remarkably stable over this vast period of time, or at least of a shared legal

tradition. The process by which this *koinē* came about is complex. We can discern several levels of interrelationship, some of which are so deep and so old that the original nature of the interaction is untraceable.

6. Three levels of commonality are discernible in the sources: intellectual, institutional, and substrate.

a) The *intellectual* level is the most obvious. We can identify the interaction there as a process of diffusion, mainly from Mesopotamia to the rest of the Near East. (Egypt stands a little apart in this respect.) It is represented by the so-called law codes.[1] The seven extant cuneiform law codes (two in Sumerian, three in Babylonian, one in Assyrian and one in Hittite) and the three biblical codes (Covenant Code, Priestly Code, and Deuteronomic Code) constitute an intellectualization of the law, presented through a list of casuistic examples. Those examples are not listed at random, but organized into groups centered on the discussion of various facets of a legal problem. Within the problem, the discussion follows certain set patterns, such as status of the victim, liability versus non-liability, contractual versus tortious liability. Between the different codes the same rules appear occasionally, but much more frequently the same problems appear, with different facets of the problem being discussed, following the same set patterns. Reception was therefore not by copying or elaboration of a written text, but rather by learning an oral canon of traditional problems, which were further discussed and adapted, with a select few ultimately being committed to writing.[2] An example is the problem of the attempted burglary. The fullest exposition of the problem is in Exod. 22:1–2:

> If the thief is caught while digging his way in and is struck and dies, he has no blood. If the sun has risen upon him, he has blood. He shall surely pay; if he cannot, he shall be sold for his theft.

The problem has two parts: justified homicide if the crime is committed by night; a relatively light penalty (less than death!) if by day. Codex Eshnunna follows the same pattern, but extends the location to an open field at harvest time:

> 12. A man who is seized among the sheaves in the field of a subject in broad daylight shall pay 10 shekels of silver. One who is seized among the sheaves at night shall die; he shall not live.
> 13. A man who is seized in the house of a subject in broad daylight shall pay 10 shekels of silver. One who is caught in the house at night shall die; he shall not live.

The "daytime" part of the problem alone is discussed in two codes, Codex Lipit-Ishtar and the Hittite Laws (HL), each opting for a different location:

> CL 9. If a man enters a man's orchard and is seized there for stealing, he shall pay 10 shekels of silver.
> HL 93. If they seize a free man beforehand when he has not yet entered the house, he shall pay 12 shekels of silver. . . .

A purer example of the intellectual (or didactic) nature of the law code tradition lies in the structure of the codes themselves. In contrast to the level of individual problems, the organization of the codes is unique to each. Where the opening paragraphs have survived, however, a certain pattern emerges.

The exception that proves the rule is Codex Eshnunna. It begins with a simple price list for goods and services. The code comes down to us in scribal school copies of a monumental royal inscription the purpose of which was (like Hammurabi's) to boast of the king's past achievements as a king of justice. The reason for the prominence of the price list was doubtless that its promulgator, king Dadusha, wished to draw special attention to what he saw as his greatest achievement as a lawgiver.

The earliest known code, Codex Ur-Namma, begins logically with the most serious crimes: homicide, robbery, and false imprisonment. Codex Hammurabi (CH) in a similar vein begins with homicide, witchcraft, and perjury. A few centuries later, the Hittite Laws begin with homicide, wounding, and kidnapping. In the first millennium, the biblical Covenant Code begins with two laws on slavery and freedom, which is not surprising given that it is inserted into a narrative about the release of the Israelites from slavery in Egypt. Immediately thereafter, however, it abruptly switches to homicide, defiance of a superior, kidnapping, and wounding. A basic tradition of how to start a law code (or a law course) therefore seems to have been passed down, albeit with variations in the details.

b) There seems to have been an earlier interaction between systems, not based on intellectual channels, which manifests itself at the *institutional* level. The clearest example is the concept of kingship, which was considered throughout the ANE as one of the foundations of civilization, indeed, a necessary part of the cosmic order. At the same time, kingship was a pragmatic expression of the struggle for power, and the contradiction between theory and practice led to a paradox. While the basis of royal power was typically the elites—the nobility and the court bureaucracy—kings everywhere felt obliged to protect the interests of the peasantry and other powerless sections of society, in particular widows and orphans. The very legitimacy of the

king's rule was deemed to be dependent on proper fulfillment of that duty. It was realized in the issue of edicts designed to establish and restore social justice. Already in the third millennium, the Sumerian king Irikagina decreed reforms that protected humble subjects from the oppression of bureaucrats and tax-gatherers. In the second millennium, the Egyptian king Horem-heb issued an edict in a similar vein. A more specialized type of reform is widely attested in Mesopotamia, Anatolia, and the Levant: the debt-release decree, cancelling not only debts but also releasing debt-slaves and land taken because of debt:

> The Edict of Ammi-Saduqa (Babylonia, seventeenth century)
> §4. Whoever has lent barley or silver to an Akkadian or an Amorite at interest or as a *melqetum*-loan and has drafted a tablet, because the king has established equity for the land, his tablet is broken. He shall not collect the barley or silver according to the tablet.
> §20. If a freeman of Numhia, a freeman of Emut-balum, a freeman of Idamaraz, a freeman of Uruk, a freeman of Isin, a freeman of Kisurra, or a freeman of Murgu is bound by a debt and sells himself, his wife, or his children, or hands them over as a pledge or a penalty: because the king has established equity for the land, he is released—his freedom is established.

The tradition continues in the first millennium with the slave release of king Hezekiah (Jer. 34).

At the same time, in the Mediterranean sphere, moves are being made to end the king's role. In the Bible, royal discretion is replaced by the automatic release in the Sabbatical and Jubilee years:

> Deuteronomy 15:1–3
> Every seventh year you shall make a cancellation. The cancellation shall be as follows: every creditor is to release the debts that he has owing to him by his neighbor; he shall not press his neighbor and his brother for payment, for a cancellation has been declared for God. You may press the foreigner for payment, but you shall cancel the debts you have owing from your brother.

> Leviticus 25:9
> In the seventh month, on the tenth day of the month—the Day of Atonement—you shall have a blast of the horn sounded throughout your land. You shall make the fiftieth year a holy year and declare freedom in the land for all its inhabitants: it shall be a Jubilee for you and each man shall return to his estate and each shall return to his clan.

c) There are common legal structures that are found in historical sources but appear to have existed in the various societies at a much earlier date—so early, in fact, that they may be said to represent a *substrate* level of law. A good example is intestate succession. The individual societies of the ANE differ in their inheritance practices, but share a common system of universal transfer of the estate to the legitimate heirs, usually brothers, who hold the estate in common, sometimes for extended periods, until such time as they agree to divide it into individual shares. The system may go back to as early as the seventh millennium B.C.E. There is archaeological evidence from a Neolithic site of the repeated repartition of rooms in urban houses over several generations. This puzzling practice could be explained by the division of inheritance shares within a family.[3]

The problems created by the period of indivision become a favorite topic of the law codes, but they treat of widely disparate problems, not different aspects of standard problems, as would be expected in the intellectual tradition. At the same time, various attempts are found by testators to overcome problems of indivision, or to curtail or extend indivision. It is even used as a metaphor in literary texts:

> Codex Eshnunna
> §16. A loan of fungibles shall not be given to an undivided son or to a slave.
>
> Middle Assyrian Laws
> §B3. If one of undivided brothers utters treason or is a fugitive, the king may do as he pleases in respect of his inheritance-share.
>
> Deuteronomy 25:5
> If brothers dwell together and one of them dies and he has no son, the deceased's wife shall not marry outside to a stranger. Her brother-in-law shall come in unto her and take her as his wife and perform the levirate. The first-born that she shall bear will rise up upon the name of his deceased brother and his name will not be erased from Israel.
>
> Testament (Syria, fourteenth century: ed. D. Arnaud, 1985–87: vol. 3, no. 15)
> Muhra-ahi son of Abi-Ra, in his lifetime, assembled his brothers and fixed the destiny of his household, his children and his wife. He spoke as follows: "Now my wife, the daughter of Kaga, is father and mother of my household. . . ."

7. At whatever level outside elements entered a given legal system, the process is anonymous and undateable. The native sources do not mention the reception of laws by one society from another. We can, of course, speculate

about the channels of communication. Diffusion at the intellectual level is linked with the spread of cuneiform writing from the third millennium on and by the widespread use of Akkadian as a legal language in the second millennium. At the institutional level, experience of governmental structures may have been transmitted through international diplomacy, which is attested already in the early third millennium, and international trade, which dates back even earlier. The substrate level is the hardest to explain. If there was diffusion, it must have taken place already in pre-historic times, even before the invention of writing spread from southern Mesopotamia. Perhaps we are dealing with a common heritage in the manner of a substrate language.

At all events, it is clear that this common legal tradition, at whatever level, was not simply the product of conquest and occupation. Although Mesopotamian empires ultimately embraced much of the ANE, the same legal traditions are found in states that were never conquered, such as the Hittites, or long before they were conquered, as in the case of Egypt or Ebla. Nor was it the product of a common language or culture. Earlier generations of scholars may have spoken of "Semitic Law," but many of the languages of the region were not Semitic and not even related among themselves. Sumerian and Hurrian come from different and otherwise unknown language families. Hittite is an Indo-European language, which should give some pause to claims of a common "Indo-European Law."

8. In the light of the depth and breadth of common ANE legal traditions, there is no reason to suppose that the diffusion of ideas from Mesopotamia and the Levant stopped abruptly at the Mediterranean shore. In the Mediterranean basin, there was free circulation of goods and persons at least as early as the Late Bronze Age. Phoenicians founded trading colonies throughout the area, as far west as Cadiz on the Atlantic coast. The trade circuits of the Near East were integrated with the Mediterranean circuits through the ports of the eastern Mediterranean, such as Ugarit, Tyre, and Sidon.

There is plenty of evidence for Near Eastern ideas penetrating the Greek sphere through a process of absorption and emulation (for example, Linear A and Linear B scripts, orientalizing art, or the alphabet). Legal ideas are no different, as long as the ANE model is accepted. It is fruitless to try to identify the process, through identified borrowers or narrow portals of opportunity.

At the same time, abandoning the hunt for lawgivers does not mean abandoning methodological rigor. The type of evidence that we should be looking for is not simply a Greek law that resembles an individual law from some-

where in the ANE, but a Greek law that fits into a long and complex ANE tradition in the same way as individual laws within the ANE do. Thus as far as the problem of the attempted burglary is concerned, the many permutations found in the ANE tradition are continued in a reference to the right to kill a burglar entering by night in Demosthenes (*Against Timocrates* 113) and, for that matter, in the Roman Twelve Tables, which apparently considered the "daytime" burglar as well (I 17–18 = VIII 12–13). The connections with the tradition of beginning a law code are more subtle. CH, although using the standard pattern, makes more subtle work of it. The opening paragraphs concern not the substantive crimes but false accusations of those crimes. Closer examination reveals that another pattern is present: paragraphs 1–5 follow the course of litigation from the initial accusation (homicide, sorcery), to conduct at the trial (false testimony), to post-trial matters (judge corruptly altering his judgment). The Gortyn Code's opening paragraphs all deal with the question of slavery and freedom, making it superficially like the Covenant Code. The underlying pattern, however, concerns the course of litigation, from opening claim to post-trial matters. The Twelve Tables seem to have the same pattern, beginning with pre-trial issues.

As regards the older levels, Solon's *seisachtheia* fits into the ANE tradition of royal debt-release decrees and his abolition of debt slavery follows the trend manifested in ancient Israel of eliminating debt slavery for citizens. The Gortyn Code's ruling on management of the estate pending division (V 28–34)[4] and Hesiod's problems with his brother (*Works and Days* 37–40) both have as their background the undivided inheritance that was food for so much discussion in the ANE.

When we identify a Greek law in this way, we should not expect to find any acknowledgment in the Greek sources of its ANE origins; quite the contrary. As we have seen, Demosthenes attributes a long-established rule on burglary to the legislative genius of Solon. To take an egregious example from the Roman sphere, the second-century C.E. jurist Gaius informs us that there is an archaic type of partnership among heirs, called *ercto non cito*, that is special to Roman law (III 154a–b). His description turns out to be an exact account of the ANE institution of undivided ownership of heirs.[5]

9. The Greek philosophical revolution in time effected a revolution in jurisprudence. Mesopotamian science, based on lists of examples, gave way to Aristotelian categorization based on *diairesis* and *merismos*, fortified by another new instrument of thought: definition of abstract concepts (*lógos tes ousías*). This in turn immensely increased the importance of legislation (in theory if not so much in practice). The legislative text now became autonomous; every

word of it became significant, and the new science of legal interpretation was founded, leading eventually to the new profession of jurist.

At the same time, the vast body of existing law was not discarded. Standard legal problems continued to be discussed, but in a more sophisticated way that made use of the new art of rhetoric. In the second millennium, the punishment of "an eye for an eye" is found already in the Code of Hammurabi (196) as part of a standard legal problem on deliberate physical injury, while the same offense is discussed in the context of the standard problem in Codex Eshnunna (42) and the Hittite Laws (7), but with a different ruling (fixed payment). Hammurabi's solution is reiterated in the first millennium by biblical law (Lev. 24:19–20). According to Aristotle, in schools of rhetoric there was a discussion of a variant on this problem, namely, the difference between the loss of one eye to a man with two eyes and to a man with only one (*Rhet.* 1.1365b17–19). Similar discussions of standard legal problems are later found among the Rabbis and the Roman jurists. It is notable, however, that the resolution of this particular variant (the one-eyed man) is turned by Demosthenes into a legendary account of legislation among the Locrians (*Against Timocrates* 139–141) and by Diodorus into a legendary account of legislation among the Thurians (12.17).

As for law codes, some, like the Gortyn Code, appear to have been created as legislation while maintaining the form and structure of the old casuistic codes. A few of those old codes, based on Mesopotamian science, were recycled to be treated as legislation, like the biblical Covenant Code and the Roman Twelve Tables. They were even given a legislative etiology. According to Roman historiography, the Twelve Tables were created at a moment of crisis in the early Republic by a committee in order to reform certain faults in the existing law. According to Hebrew historiography, the biblical laws were decreed by a lawgiver, God, at a charismatic moment in Israel's distant past. Small wonder that Hellenistic historians attributed foreign influences on Greek law to the same process.

Notes

1. It is also represented by notarial traditions, but few archives have survived in scripts other than cuneiform, making proper comparison difficult. An exception is the classic study by Y. Muffs of the technical phrase "his heart is satisfied," tracing it from early-second-millennium Mesopotamia to late-first-millennium Egypt and beyond (1969).

2. In the notarial tradition, the text is obviously more important. Within the cuneiform record, the same contractual terms and technical phrases recur,

sometimes in unrelated societies after gaps of hundreds of years (e.g., Sumer and Nuzi: see Hackett and Huehnegard 1984 and see further Muffs 1969 [n. 1] on "his heart is satisfied."). A cuneiform scribal tradition of model contracts and lawsuits and dictionaries of legal phrases apparently had its counterpart in Egypt, but is only attested in the Hellenistic period (Mattha and Hughes 1975).

3. See Yoffee 1968.

4. If some of the heirs wish to divide the inheritance while others do not, the judge shall order that all the property shall be in the possession of those who wish to divide until they divide.

5. Herodotus comes closest to acknowledgment in noting that the Spartans have a practice comparable to the Persians, in that a new king on his accession releases the debts of individual Spartans, just as a new Persian emperor forgives cities their arrears of tribute (6.59). In fact, accession to the throne was the archetypal occasion for Mesopotamian kings to release debts, already attested in the second millennium. Herodotus does not actually claim that the Spartans borrowed their custom from the Persians.

CHAPTER FIVE

The Nature and Origins of the Twelve Tables

Abstract

This article establishes a link between the early Roman code, known as the Twelve Tables, and the ancient Near Eastern law codes. The relationship between the two is evident both in the form of the codes and in their content. Both appear to derive from the Mesopotamian scientific tradition and to deal with similar legal issues that likely formed part of the curriculum in scribal training. A detailed examination of the treatment of issues such as minor physical assault and theft in the Roman and Mesopotamian material supports this line of reasoning.

Introduction

THE NATURE OF THE TWELVE TABLES

The various accounts from classical sources agree that the Twelve Tables were a *lex*, a normative statute of the type familiar from the late Republic, promulgated after due deliberation by a legislative body. Indeed, the Twelve Tables were "the *lex*," the archetypal piece of legislation that initially at least constituted a comprehensive codification of the law in force—*fons omnis publici privatique iuris* ("the origin of all public and private law"), as Livy puts it (3.34.6). And like any *lex* its formulation arose out of specific historical circumstances (the struggle between the patricians and the plebe-

[Originally published in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Romanistische Abteilung*) 105 (1988): 74–121. Reprinted with permission, which we gratefully acknowledge. Crawford 1996 uses a new numbering system for the *Twelve Tables*. This article retains the older system.—Eds.]

ians), the problems of which their provisions were designed to resolve (by removing the plebeians' grievances).

Modern scholarship, while discounting the incidental legends of the traditional account, has been singularly uncritical in assessing its basic premises. Since the universal rejection of Pais' and Lambert's heresy as to the date and authorship of the Twelve Tables,[1] the scholarly consensus has been that the code was indeed the product of conscious intellectual effort on the part of a commission of ten individuals, duly confirmed by a constituent assembly (as legislation ought to be), at about the date ascribed by tradition, namely, the mid-fifth century B.C.E., and designed to impose a sweeping reform upon the existing law, a new order that would improve the lot of the plebeians.[2]

Problems arise, however, when we try to apply this view of the Twelve Tables to its actual provisions, as known to us from the surviving fragments. Firstly, there is the question of form. As Daube points out, the predominantly casuistic style of the Twelve Tables ("If a man does X, he shall be subject to Y punishment") is not the form used by classical legislation.[3] But this, it may at once be countered, is scarcely a problem at all. The Twelve Tables are the product of a primitive society; they cannot be expected to have developed the sophistication of the later laws, and any differences may therefore be attributed to normal historical development. This all too obvious explanation, however, leads one to wonder whether the elaborate machinery of the Decemvirs, etc., while eminently suitable for legislation of the classical period, is not also too sophisticated for such a primitive society?

The form of the text gives rise to a further problem. Wieacker discerns two basic stylistic forms: laconic imperatives in parataxis and (the more dominant) the conditional sentence. Even the occasional use of a relative sentence reveals the same thought structure: rules such as *Qui malum carmen incantassit* ("he who uses a malevolent incantation," a law against sorcery, VIII 1) could equally well be formulated as a conditional sentence.[4] The result is a series of specific solutions to narrow sets of circumstances; lacking are abstract norms, general principles, or definitions.[5]

In consequence, the Twelve Tables could not have been a comprehensive code, even of the private law to which the surviving fragments seem mostly to confine themselves.[6] Here at least, some modern scholars break ranks with the orthodox Roman view. Gioffredi suggests that the provisions allude to the unwritten principles of the law which, being generally known, there is no need to state expressly,[7] thus admitting the existence of a customary law with equal validity as the written text. Kaser, following the same

line of thought, regards the Roman view as a fiction which arose some time after the Twelve Tables' promulgation.[8] The bulk of the law was based on unwritten tradition (*mos maiorum*), while the Twelve Tables affected only a relative small number of rules, which they confirmed or amended.[9] It is to be noted that Kaser's explanation, in denying comprehensiveness to the Twelve Tables, at the same time assumes that they had the character of a classical *lex*, the point being that in later history *lex* was only a sporadic source of law alongside the all-embracing *ius*.[10]

We thus come to the final and most serious problem: the apparent lack of reference in the extant rules to the events which were supposed to be their "raison d'être." Commentators have made great efforts to discover in the terse provisions on private law reforms for the benefit of the plebeians, but all such interpretations are based on *a priori* reasoning. If we did not know of an external tradition concerning patricians and plebeians, would we conclude from the text of the Twelve Tables alone that they were designed to reform the law in favor of plebeians? Hardly.

1. The text contains only one express reference to the two social classes, namely, the prohibition on intermarriage (XI 1), which suggests quite the opposite.[11]
2. In the rules on debt, the right of the creditor to take the debtor "bound with fetters or shackles of 15 pounds, not less, or more if he wishes" (III 3) does not suggest social legislation in favor of the debtor, always assuming the latter to be identifiable with the plebeian class.
3. The bulk of the rules deal with very ordinary aspects of private law, such as procedure, inheritance, and delict. They could apply to almost any period or society.
4. A small number of rules apply to religious practice such as funerals, and are as such of no social immanence.[12]

Furthermore, the very simplicity of the rules belies the notion that the plebeians' ignorance of the law was an evil removed by the legislation. The law was bound to be revealed to them by the precedents that they themselves experienced; only its subtleties could be hidden from them, and these would rely on a level of sophistication or a mass of detailed exceptions of which there is no trace in the published text. The most ignorant plebeian could hardly have been unaware that it was forbidden to bury or burn bodies in the city, if that rule had been enforced but once. And by the same token, if there were subtleties concealed from the plebeians, then the provisions of the extant text are singularly inapt for removing them. As Watson admits:

". . . would the XII Tables have enabled the plebeians to know what the law was, and to exercise their private law rights? No! Law remained a mystery. Though the code is explicit on how to summon a defendant to court, on appropriate sureties and so on, there is not a word on the forms of action. One would not learn from the code how to frame the appropriate legis actio."[13]

We conclude, therefore, that the form of the Twelve Tables does not bear the unequivocal marks of a legislative process and that their content is not necessarily explicable by reference to particular historical events. The hypothesis that we shall present in this study is that originally the Twelve Tables, far from being a *lex* in the classical sense, were not normative legislation at all and certainly not a comprehensive code. They represent a work of an entirely different character, a character which is intimately connected with the question of their origins.

THE ORIGINS OF THE TWELVE TABLES

The classical account with its story of a mission to Greece does at least hint at some foreign influence in the laws. Modern scholarship, on the whole, has taken a much more chauvinistic attitude. Thus Westrup claims: "The Laws of the XII Tables are beyond any doubt whatever as a whole essentially of national Roman origin, even though the composition of a single precept may have had a provision in Solon's laws for its prototype."[14] Westrup would look to Rome's own Indo-European heritage for the origins of its law.[15]

The foremost representative of the contrary opinion remains the thesis of Müller in 1903.[16] Having noted that a number of provisions in the newly-discovered Code of Hammurabi bore a close resemblance to provisions of the Covenant Code in Exodus and in some cases also to those of the Twelve Tables, Müller concluded that the first two derived from a common Semitic "Urgesetz,"[17] while some parts thereof were further incorporated into the Twelve Tables through the medium of Greece, where the decemviral mission had become acquainted with that same document.[18]

Müller's hypothesis has been universally rejected, often in the strongest terms. The last detailed refutation was by Volterra in a long essay on the originality of the earliest Roman law.[19] Volterra compared the early Roman and ancient Near Eastern legal systems by an analysis of institutions and concluded that they were incompatible.[20] There is little point in discussing the details of Volterra's comparisons, for two reasons.

The first is one noted by Volterra himself: that future archaeological discoveries might invalidate his conclusions.[21] It is not any particular discovery but the constant addition of new source-material, including a vast quantity of legal sources, that has rendered Volterra's prediction accurate.

This material, together with equally extensive advances in the science of cuneiform studies, has rendered the learned works on ancient Near Eastern Law upon which Volterra relied mere milestones in the history of research.[22] Very little of their conclusions remains valid today: in terms of philology alone, many legal terms which were previously mistranslated or untranslatable have been clarified, leading in turn to a radically different interpretation of the legal context in which they appear.[23]

The second reason is that Volterra's comparison reveals what in our opinion is a fundamental error of method. Volterra took as his point of departure early Roman law as traditionally interpreted, in other words, more or less as seen through the eyes of classical Roman commentators.[24] Now, it may be readily accepted that the classical law was a unique product of Roman civilization, and on this basis it is easy to conclude, when comparing the "classical version" of early Roman law with ancient Near Eastern law, that there is no connection between the two.

It did not occur to Volterra that our understanding of early Roman law might be open to re-interpretation in the light of the ancient Near Eastern material. After all, it is not as if our present understanding of early Roman law removes all obscurities or inconsistencies. It is a methodological error therefore to use the classical interpretation as if it were a constant. Nonetheless, the approach implied in Volterra's method has recently received emphatic expression in Watson's study of the Twelve Tables: "When the direct evidence for archaic Roman law is inconclusive we often have a safer guide than that provided by unconnected systems, namely, developed Roman law. There is really very little connection between early Roman law and, say, the law of Babylon, but the law of the later Roman Republic and of the classical period is the immediate descendant of the law of the early Republic and the XII Tables."[25]

We would argue that the position is by no means so clear. It is well known that much of the early text was obscure to the Romans themselves: the meaning of some terms had already been lost.[26] In the case of the jurists, their interpretation was by definition a distortion, since they were not interested in seeking historical truth but in establishing a rule that would work for their own, vastly different, conditions.[27] But even the so-called "historians" cannot be relied on: being unaware of the conditions of early Roman society, they could only interpret the ancient texts in the light of their own experience. Far from trying to penetrate the thought-process of their ancestors, they imposed their own conceptions upon them.[28] Needless say to, many traditions were preserved, but they must be treated with caution, and not regarded as inherently reliable.

We shall attempt to show in the course of this study examples of where the ancient Near Eastern material can be used, on the one hand to confirm a native Roman tradition and, on the other hand, to clarify a misunderstanding of the law arising from it where that tradition results in an apparent internal contradiction. Such cases in themselves raise a presumption of some connection between the legal systems, but they are insufficient without a proper framework within which the existence of such connections can be accounted for. This framework we hope to provide in demonstrating the common derivation of the Twelve Tables and its counterparts from the ancient Near East.

We thus return to Müller's thesis. The rejection of criticism such as Volterra's does not automatically rehabilitate the former's approach. For Müller, no less than the rest of modern scholarship, assumed in his comparisons that he was dealing with normative statutes. The "Urgesetz" postulated by him was assumed to have been a single piece of legislation[29] which was reproduced more or less faithfully by Moses, adapted by Hammurabi,[30] and adopted in part by the Decemvirs. Müller even surmised that a legal commission might have been responsible for Hammurabi's version.[31] Modern research on the ancient Near Eastern law codes has rendered the idea of an "Urgesetz" untenable. Indeed, it is our different understanding of the nature of these law codes that provides the key to the connection between them. But by the same token, this new understanding may be applied equally to the Twelve Tables, so that Müller's researches can be said to have pointed in the right direction. We therefore turn now to examine the ancient Near Eastern material.

The Ancient Near Eastern Law Codes

THE FRAMEWORK: ANCIENT NEAR EASTERN CIVILIZATION

Little more than a century ago virtually the only native evidence that existed for the ancient Near East before the conquest of Alexander was the Hebrew Bible. This document, standing in isolation, provided an obscure and often incomprehensible record of the culture from which it arose, and a highly distorted view of the surrounding civilizations. The archaeological and epigraphical evidence provided since then by excavations in the region has revealed that biblical Israel was but a minor part of a much wider civilization. The various kingdoms of the region were in constant contact throughout millennia, through trade, diplomacy, and at times by direct conquest. Through these channels passed not only men and goods but also ideas: wholesale literary, religious, and scientific traditions.

The pattern of diffusion of ideas was generally from Mesopotamia outwards.[32] The main reason seems to have been the system of writing. Cuneiform script, invented by the Sumerians in the early third millennium, was adopted by their Akkadian-speaking[33] neighbors and thence spread to other areas where it was adapted to the local languages. Already in the third millennium Ebla, in Syria, was using cuneiform for its language,[34] and in the second millennium cuneiform scribal schools were to be found as far afield as Armenia (Urartu), Anatolia (Hittites), Palestine (Canaan), and Egypt.[35] In this process, of particular interest to our inquiry is the position of the Hittites and of ancient Israel.

a) The Hittites spoke an Indo-European language and were never incorporated into any of the Mesopotamian empires.[36] Thus the existence of Mesopotamian traditions in their records can neither be due to some presumed common Semitic heritage[37] nor to the forcible imposition of a foreign culture. Assyrian merchants were active in Anatolia in the early second millennium (before the rise of the Hittite empire),[38] while the later Hittite Empire appears to have imported Babylonian scholarship on a larger scale.[39]
b) The main record of ancient Israel, the Hebrew Bible, is thoroughly pervaded with Mesopotamian influences while at the same time manifesting extreme ideological hostility to Mesopotamian culture.[40] Thus the absorption of outside traditions was not altogether a conscious act of will.[41] Furthermore, the Bible is not written in cuneiform script, showing that the traditions in question could survive the demise of the script in which they were originally expressed. Indeed, such was the tenacity of these traditions that many survived into post-biblical Rabbinic literature, even when not mentioned in the Bible.[42]

The spread of Mesopotamian traditions was therefore only in small part due to conquest or ethnic factors. It appears to have occurred mostly through political and commercial interchange, fostered by the use of the cuneiform script. It manifests itself in every field of ideas, most notably in literature, religion, and science.

a) In the literary sphere the best-known example is the Flood story, derived from a Mesopotamian original, which finds its way into the biblical creation account in Gen. 6:9–9:17.[43] But there are other examples that follow other patterns of diffusion, for example, the Harab myth, which passes from a Babylonian version into the Hittite

sphere.[44] Often we find preserved not the whole myth but elements thereof, as with the *apkallu*, the seven Mesopotamian sages, who were said to have pre-dated the Flood and who have recently been identified in Prov. 9:1.[45] On the other hand, it may be not the content of the literature that is transmitted, but the literary genre, for example "city-laments" or "building stories."[46]

b) The diffusion of traditions in the religious sphere is evidence of even deeper influence. Although they worshipped different gods, the peoples of the ancient Near East shared many cultic practices and concepts, including the classification of sins.[47]

c) A third significant sphere was that of the sciences, but we shall postpone our discussion of the scientific tradition for the moment, and deal first with the position of the law codes in this general picture.

THE LAW CODES

The so-called "law codes" from the ancient Near East form a literary genre in which the common tradition is particularly evident. Nine such documents are known to date, seven in cuneiform script and two from the Pentateuch. They are as follows:

1. Codex Ur-Namma (CU), from the city of Ur in southern Mesopotamia. It is written in Sumerian and dates from ca. 2100 B.C.E.[48]
2. Codex Lipit-Ishtar (CL), from the city of Isin in southern Mesopotamia. It is also in Sumerian and dates from ca. 1930 B.C.E.
3. Codex Eshnunna (CE), from the eponymous city in northern Babylonia. It is written in Akkadian and dates from ca. 1790 B.C.E.
4. Codex Hammurabi (CH), from Babylon, is written in Akkadian and dates from ca. 1750 B.C.E.
5. The Middle Assyrian Laws (MAL), from the time of Tiglath-Pileser I (end of the twelfth century B.C.E.). They are written in the Assyrian dialect of Akkadian.
6. The Hittite Laws (HL) are written in Hittite and date from between the sixteenth and twelfth centuries B.C.E.
7. The Neo-Babylonian Laws (NBL) date from the seventh century B.C.E. They consist of a small tablet apparently copied from a larger corpus.

The two biblical codes are:

8. The Covenant Code from the book of Exodus (Exod. 21:1–22:16). It is impossible to date this code with any certainty, but it may be

one of the earliest strata of biblical literature, probably dating from the first third of the first millennium B.C.E.

9. The Deuteronomic Code from the book of Deuteronomy (Deut. 21:10–25:16). This is generally dated to the seventh century B.C.E.

All these codes share certain characteristics which immediately mark them as belonging to a single literary genre:

1. Their content is a collection of legal rules dealing with everyday problems of non-sacral law, i.e., the settlement of legal disputes arising from delict, contract, and the like; the establishment of rights in respect of property, status, etc., procedural rules, or simply norms with a socially immanent sanction.[49]
2. The form is casuistic. The law is expressed as a series of individual cases, the circumstances of which are put into a hypothetical conditional sentence ("If a man does X, . . ."), followed by the appropriate legal response in the particular case (". . . his punishment shall be Y"). While there is some variation within the framework of this form, e.g., the protasis can begin "a man who . . . ," or the whole rule can be cast as a direct order ("no credit shall be given to . . . a slave"), the approach is always the same.

As significant as their form is what is missing from all these codes. Two features of classical and modern law codes are notable for their absence: division into abstract legal categories and legal definitions.[50]

To understand the nature of these codes, we must review the research that has been conducted upon the most famous among their number, Codex Hammurabi. It has long been recognized that the term "code," applied to it in the *editio princeps*, is a misnomer. Large areas of the law are not touched upon, and even in those that are there is not the slightest pretension to completeness[51]—a task which, given its casuistic form, would require an almost infinite number of paragraphs.

Could these individual paragraphs be understood each as a reform of some specific point of law? At one point Driver and Miles, in their commentary on CH, seem to take this view: "The laws must not be regarded as a code or digest, but as a series of amendments to the common law of Babylon. . . ."[52] This position, however, is too difficult to maintain. Too many of the rules already appear in earlier codes,[53] and too many of them deal with matters so central or banal that it is difficult to imagine that the law would have been otherwise previously. Accordingly, a few pages later, Driver and

Miles expand their original statement to: "a series of amendments and restatements of parts of the law in force. . . ."[54] Nonetheless, there was no doubt in these learned authors' minds that they were dealing with a source of positive law, any more than there had been in the earlier commentaries of Müller or Koschaker.[55]

Doubts on the issue were first expressed by Landsberger, who pointed out that CH is never cited as authority in judgments (of which many contemporary examples have been preserved).[56] Landsberger's suspicions were finally confirmed in a seminal article by Kraus.[57] Kraus takes as his starting point Hammurabi's own statement in the epilogue to the code, where the foregoing paragraphs are described as the "just judgments (*dināt mīšarim*) that I made." The legal corpus is therefore *prima facie* a list of the king's decisions in his capacity as a judge.[58]

The paragraphs are, it is true, not recognizable as judgments in their present form, having been denuded of the names of the parties and all other details that might connect them with an actual case, and having been put into the form of a hypothetical set of circumstances. On the other hand, this might be all the better for casting them in the role of precedents, since something akin to the *ratio decidendi* now stands stripped of irrelevant details and ready to be applied in analogous circumstances.

Closer examination, however, reveals that by no means all the "judgments" recorded in the code are actual decisions in real cases. They are organized in groups wherein a single case is expanded by logical extrapolation, i.e., various theoretical alternatives are considered and the appropriate solution given by *a priori* reasoning.[59] For example, paragraphs 229–231 read:

> 229 If a builder builds a house for a man and does not make his work strong and the house that he built collapses and kills the owner of the house, that builder shall be killed.
> 230 If it kills a child of the owner of the house, they shall kill a child of that builder.
> 231 If it kills a slave of the owner of the house, he shall give slave for slave to the owner of the house.

Similar gradation of penalties occurs elsewhere in CH, in paragraphs 209–211, for example. We are therefore in the presence of a type of academic method. Now, this same method is found in a seemingly unrelated group of texts—the omen collection. For example, in the omen series *šumma izbu* a typical sequence is:

5 If a woman gives birth, and the right ear (of the child) is (abnormally) small, the house of the man will be scattered.
6 If a woman gives birth, and the left ear (of the child) is (abnormally) small, the house of the man will expand.
7 If a woman gives birth, and both ears (of the child) are (abnormally) small, the house of the man will become poor.[60]

The connection, according to Kraus, is that the law codes and omen collections are both representative of a particular genre of literature, *scientific treatises*.[61] Divination was regarded as a science by the Mesopotamians and the compiling of omens the equivalent of scientific research. By the same token, the casuistic style in which both texts are couched was the "scientific" style par excellence—transferring the concrete individual case to the sphere of the impersonal rule.[62] The implications of Kraus' insight into the intellectual context of CH are:

1. CH is not legislation as we understand it; it is not new law created by a process of theoretical reasoning that will apply prospectively to hypothetical situations conceived through that reasoning. The basis of CH is judge-made law: a series of retrospective decisions concerning existing situations which acquire a prospective character only through their eventual application as precedents.[63] The "scientific method" employed seeks to enhance their prospective character somewhat by adding theoretical variants to the existing decisions. But being only logical extrapolation, these variants do not create new law; they merely discover the law.
2. So far from being legislation, CH is not even prescriptive; it is descriptive. It is essentially a record of the common law, that is, the traditional corpus of unwritten law built up mostly through precedents, together with the occasional intervention of administrative measures.[64] The text of the code is not itself authoritative, since the legal rules that it describes are already so in their own right. The nearest modern analogy would be a legal textbook.[65]

CH, as we have seen, does not stand in isolation. It is only one (and not the earliest) in a series of documents found scattered throughout the ancient Near East that share the characteristics of a separate literary genre. Consequently, it may be postulated that the other "law codes," which all use the same casuistic approach, are likewise scientific treatises rather than prescriptive measures, and further that these codes are dependent upon a scientific tradition emanating from Mesopotamia.

This hypothesis is confirmed by two factors. The first is the general context of ancient Near Eastern civilization of which we have spoken. We mentioned the role of cuneiform script as a medium of transmission and the existence of scribal schools throughout the region. The transmission of Mesopotamian scientific traditions alongside literature and religion is comprehensible when it is realized that these schools taught not only the difficult art of writing cuneiform; they were the "universities" of the ancient Near East. On the one hand they were the bearers of Mesopotamian culture: literary monuments such as the Epic of Gilgamesh were part of the scribal curriculum, as was Codex Hammurabi.[66] It continued to be copied and recopied in scribal schools both in Babylonia and elsewhere for more than a millennium after its original composition. On the other hand, the schools were centers of "scientific" research, where lists of omens, medical texts, etc., were compiled and refined. As a scientific subject, law would give rise to the same research and could expect to enjoy the same pattern of diffusion.[67]

The second factor is the content of the law codes themselves. While each of the codes contains a fair proportion of original matter (at least in as far as no parallel has yet been discovered), certain material seems to recur again and again. This is discernible on three levels:

1. In a very few instances, there appear to be verbatim copies (or rather, translations) of paragraphs from one code to another. This is the case with CH 161 and CL 29[68] and with Exod. 21:35 and CE 53.[69]
2. More frequently, the same rule is found in several codes, albeit expressed in a somewhat different manner.[70]
3. Most common are cases in which the same problem is found, either with a somewhat different solution or with attention paid to different aspects of the problem.[71]

It has been argued in the past with regard to specific parallels between the codes that these are mere coincidence or the inevitable response of different societies faced with similar problems. Given the cultural context that we have described, and within this context the sheer quantity of parallels, such a view is no longer tenable.[72] Where parallels occur in the different codes of the ancient Near East, the most reasonable explanation is that there was some contact between them. But what form of contact? The answer is much more complex than Müller's assumption of an "Urgesetz" and constitutes a central plank of our wider thesis. Let us reconsider for a moment the nature of Mesopotamian science.

Modern scientific method, derived from Greek philosophy, is a vertical system. The material is first organized into general abstract categories, the

terminology of these categories defined so that it can at once be seen what material is included and what excluded, then the general categories broken down into successively smaller categories, with appropriate definition of the terminology, until the individual case is reached.

All this was beyond the reach of Mesopotamian science. It was incapable of creating abstract categories or of defining terms. Consequently it was forced to proceed horizontally, to present concrete examples of the topic under discussion, and to exhaust that topic by the accumulation of ever more examples pertaining to different facets thereof. The result is an extremely fragmentary picture, since an infinite number of examples would be necessary to cover the whole of any given topic. In an attempt to overcome this limitation, the science developed certain techniques.[73] These can be illustrated by the method whereby the law codes were constructed.

The starting point was a judgment in an individual case. Preferably a borderline case was taken, since the law in the ordinary case could also be derived from it by implication. For example, in a discussion of rape, a case involving a girl who was betrothed but not married would theoretically inform one also of the position of a fully married woman. The facts and the judgment were then re-cast in the anonymous, objective form of the casuistic sentence that, as we have seen, is the hallmark of the Mesopotamian scientific style: "If a man rapes a betrothed woman, his punishment is Y."[74]

This hypothetical case can then be examined more deeply by the technique of variation. Firstly, the circumstances can be changed in some details: if the girl were willing, if she were unwilling but unable to call for help, etc.; or a vital circumstance can be changed that reverses the judgment from liability to non-liability, or vice versa. Secondly, a further set of variations that follow a fixed pattern may be imposed, such as attributing different grades of status to the parties.

The examples that constitute the law codes were not, therefore, cumulated at random, but result from the application of a scientific method. They have not been taken directly from original legal sources but have passed through a stage of processing in an academic school where the traditions of Mesopotamian science were taught.

The basic building blocks for the codes were thus "scholarly problems"—cases that may have begun life as a "cause célèbre" but then became the object of a theoretical discussion in the scribal schools, where all manner of hypothetical variations to the actual circumstances were considered so as to build up a series of precedents grouped around a single theme. A propor-

tion of these problems will have been derived from local judgments and decisions. But where the same problems recur from code to code, it is not because they were re-discovered by each legal system. They formed a canon that was received by each school as part of the scientific tradition.[75]

The existence of a canon of scholarly problems helps to resolve certain anomalies in the parallels between codes that could not be satisfactorily explained by the idea of simple copying from one text to another or of an "Urgesetz." Thus the parallels do not appear in the same order in the different codes, as one might have expected: the same rules may be expressed in very different ways, and the same problems may result in different solutions or may contain aspects which appear in one code and are omitted in another. Nor does the flow of parallels between codes follow any consistent pattern; it certainly does not all pass through CH.[76]

No single code manages to cover every aspect of the traditional problem; instead each selects such facets as it deems germane to its own discussion. The rest are not consigned to oblivion; they are part of the common law and their existence is assumed. Moreover, the discussion is a creative process: one code may choose to propose a different solution (although, it must be emphasized, this will not be radically different but within the terms of reference of the received discussion), or to develop the discussion by considering new aspects, using the same method of variation and logical extrapolation.[77] It is in fact by assembling the parallel and not-quite-parallel provisions of the different codes that we are able to reconstruct the full problem and to identify differences in approach between the codes, if any.

To illustrate the above process, we have selected two fairly simple examples. The first is the case of the rape of a betrothed maiden, which is dealt with by four codes.

> CU 6: If a person proceeds with force and deflowers a young man's wife who has not yet been deflowered, he shall kill that man.
> CE 26: If a man brings the bride-price for the daughter of a man, but another, without asking her father and mother, abducts her and deflowers her, it is indeed a capital case; he shall die.
> CH 130: If a man binds a man's wife, who has not known a male and is living in her father's house, and is caught lying in her lap, that man shall be killed; that woman shall be let free.
> Deut. 22:23–26: If there is a nubile girl[78] betrothed to a man and a man finds her in the city and lies with her, you (pl.) shall bring them both out to

> the city gate and stone them to death: the girl because she did not cry out in the city and the man because he took advantage of his neighbor's wife; you (s.) shall remove the evil from your midst. But if the man found the betrothed girl in the country and seized her and lay with her, the man who lay with her shall die alone; you (s.) shall do nothing to the girl.

The act is described in roughly the same terms in all four cases, but the status of the girl is not. The connection becomes clear, however, from the substantive law of betrothal in the ancient Near East. Betrothal was in two stages: the first, a simple contract between the groom (or his parents) and the parents of the bride. The second stage was begun by payment of the agreed bride-price, which made the bride a wife vis-à-vis third parties, even though the relationship between the parties remained contractual and could be terminated without the need for divorce.[79] Both Sumerian and Akkadian lack a technical term for this stage and therefore use various circumlocutions. The terse Sumerian law emphasizes the woman's virginity and the fact that she is the wife of a *guruš*, a technical term rather inadequately translated "young man" here, but which probably refers to the fact that the man is not yet a father.[80] Akkadian lacks even this term, so CH focuses on the fact that the wife has also not yet left her father's house, as a bride would do on completion of the marriage. Hebrew, on the other hand, does have a technical term for this stage of betrothal and can therefore dispense with circumlocution.

Note that only two codes give any hint as to the identity of the executioner: CU's formulation probably refers to the wronged fiancé (although it could be the father), while Deuteronomy seems to indicate a public body. Here, then, may be a difference between the two systems.

Deuteronomy differs from the other codes in the range of its discussion. It includes the possibility that the girl was willing, in which case she also is punished. This, however, is hinted at in the final provision of CH that the girl is to go free—suggesting that in other circumstances she would not. There is therefore an inference here of a wider oral discussion that did not find its way into the final text.

Furthermore, Deuteronomy applies an evidentiary test in deciding whether the case was rape or seduction. This same test occurs in HL 197:

> If a man seizes a wife in the mountains, it is the man's crime; he shall die. If he seizes her in the house, it is the wife's crime; she shall die. (If the husband finds them and kills them, it is not an offense.)

In other words, Deuteronomy has broadened the discussion without changing its terms of reference by applying an evidentiary test from another

context, that of the rape or adultery of a married woman, which logic would have admitted as appropriate anyway.

Finally, it is important to note how the same legal distinction (betrothed, as opposed to single or married) has been transmitted from code to code in a context where it is not absolutely necessary (rape), despite differences in language and culture, not to mention distances of time and space.

The second example is a case of non-permanent injury, which is dealt with in three of the law codes.

> CH 206–208: If a man (*awīlum*)[81] strikes a man (*awīlum*) in an affray and inflicts a wound on him, that man shall swear "I did not strike knowingly" (i.e., with malice aforethought) and shall pay the doctor. If he dies of his blow, he shall swear, and if he (the victim) is the son of an *awīlum* he shall pay ½ mina of silver; if he is the son of a commoner (*muškēnum*) he shall pay ⅓ mina of silver.
>
> HL 10: If someone wounds a man and makes him ill, he shall nurse him. He shall give a man in his place, and he (the latter) shall work in his house until he is well. When he is well, he shall give him 6 shekels[82] of silver and pay the doctor's fee. (A later version adds:. . . When he is well, he shall give him 10 shekels of silver and pay the doctor's fee. If it is a slave, he shall pay 2 shekels of silver.)
>
> Exod. 21:18–19: If men fight and a man strikes his neighbor with a stone or a fist and he does not die, but falls to his bed: if he rises and walks abroad on his stick, the striker is clear; he shall pay only his idleness and his (medical) treatment.

Let us begin by noting what the three texts have in common. Firstly, they all concern injury which is non-permanent but results in a period of incapacitation. Secondly, they all mention a doctor's fee. This is quite an unusual feature: nowhere else in the discussion of personal injury is such an expense mentioned, nor for that matter is there any such correlation between the penalty and the expenses suffered by the victim.

Thus we have a traditional scholarly problem with its traditional solution adopted by three different systems. But from this point onwards variations begin to appear on the basic theme. We may list them as follows, using CH as our point of departure.

a) CH expressly deals with the question of intention, stressing the absence of malice. The other two codes do not, but both HL and Exodus locate the injury in the context of a fight, thereby indicating that this is not a case of pre-meditated assault. Exodus adds the further

detail of "a stone or a fist" (as opposed to a deadly weapon), suggesting a spontaneous reaction. The latter two codes may therefore be applying the same test as CH, but arrived at by a different path.
b) The total payments vary between all three, CH mentioning only the basic doctor's fee, Exodus a doctor's fee and compensation for loss of work, while HL's approach is yet more generous: doctor's fee plus a substitute for his work plus a lump sum payment. Note that the later version of HL even increases the latter payment.
c) CH expands the discussion to cover the case where the blow results in death. The other two codes do not do so in this context.
d) CH, in discussing death, adds the further dimension of the victim's status. The first sequence is: man wounded, son killed.[83] The intermediate cases of son wounded and man killed are omitted; we are expected to be able to deduce them from the examples given (although in practice it assumes knowledge of the common law). This is a common device in the codes for economizing on variations. It would normally go on to the third member of the sequence, the slave. This happens in the later version of HL, which adds the slave to the discussion of injury.
e) CH discusses a distinction not found in other codes, between *awīlum* and *muškēnum*, the latter apparently being a member of the poorer classes.[84] This does not point to a fundamental difference between the law of CH and the other two codes or to any reforming zeal in the latter omitting the distinction. It is rather a special concern of CH which it introduces into cases in many different areas of law.

Thus on the premise of a scholarly problem, we are able to follow the same tradition from one system to another. The principle remains the same throughout; only on the secondary question of the level of compensation do they differ.[85]

The Ancient Near East and the Twelve Tables

THE FRAMEWORK

From the Persian Gulf to the shores of the Mediterranean, we have outlined the influence of Mesopotamian civilization, and within that civilization the influence of its scientific tradition, and within that scientific tradition again the influence of its legal science. Can that influence be shown to have spread even further, across the Mediterranean basin to Rome itself?

Three intermediaries immediately present themselves. The Etruscans have been assigned a Near Eastern origin by one school of thought,[86] but

the matter remains so obscure and controversial that no reliance can be placed upon this possibility for the purposes of our discussion.

The Greeks certainly had contacts with both worlds, but the Eastern influence on their early culture is a problem in itself which cannot be pursued here, let alone the question of its further transmission.[87]

The Phoenicians present a far more promising intermediary, being direct bearers of ancient Near Eastern culture. There is ample evidence of their contact with early Rome, and it is on this evidence that we shall concentrate.

Of the three channels for the passage of ideas that we noted in the ancient Near East—trade, diplomacy, and conquest—only the first two could apply to connections with early Rome. The existence of Phoenician trade in central Italy has been well attested from at least the eighth century, with the orientalizing period from about 700 B.C.E., bringing in works of art from as far away as Syria and Mesopotamia, together with a corresponding influence on the local material culture.[88] The Phoenicians set up trading colonies in Etruria and possibly even on the site of Rome itself.[89]

On the diplomatic front, Polybius records the terms of a treaty with Carthage as the first of such acts by the new Republic (3.22.4–13). Without entering into the question of the accuracy of its details or the precise date, the feasibility of such diplomatic contacts at that period has been demonstrated by the Pyrgi inscription, which we shall discuss below. Diplomatic contacts between Etruria and Carthage, it should be noted in passing, are mentioned by Aristotle (*Politica* 1280a) as if common knowledge.

Evidence that these contacts functioned as the channels for significant Phoenician influence on Roman thought is provided firstly by the sphere of religion. Van Berchem has argued that the Ara Maxima at Rome, the site of temples and an altar to Hercules, was originally a Phoenician temple to Melqart, the God of Tyre.[90] According to the same author, it was the oldest cult in Rome, practiced before the foundation of the city itself.[91] The significance of Van Berchem's theory lies not only in the existence of such a temple but in the fact that much of the evidence adduced by him comes from peculiar features of the later Hercules cult which are survivals from its Semitic origins.[92] The temple was not therefore a closed facility for foreign merchants alone; it entered the religious life of the host nation and its influence remained long after their departure.

In 1964, excavations of a temple at Pyrgi revealed three metal plates with inscriptions in Phoenician and Etruscan.[93] Pyrgi was one of the seaports of Caere, an Etruscan city known to have had an alliance with the Phoenicians,[94] but also enjoying close connections with Rome.[95] The first plate of gold contains an inscription in Phoenician wherein the Etruscan

ruler dedicates a temple[96] to Astarte. The second, also of gold, appears to be a translation or equivalent dedication in Etruscan, and the third plate, of bronze, also in Etruscan, seems to refer to a later commemoration of the dedication.

The Pyrgi inscription gives to a foreign cult an even stronger role than that which we postulated for the temple of Melqart at Rome. It reveals more than "direct, immediate contacts with the Semitic world";[97] it demonstrates penetration of the local culture by the latter civilization. As Heurgon points out, in these parallel inscriptions it is the Phoenician text which dictates all the minutest details of the ceremony, while the Etruscans have only to translate them as best they can and follow their precepts.[98]

The second sphere for which we have evidence of influence is that of law itself, thanks to a series of researches by Yaron. The first of these that we wish to consider derives from international diplomacy: in a treaty between Rome and the Latins, the Foedus Cassianum of 493 B.C.E., the text of which is given in Greek translation by Dionysius of Halicarnassus,[99] the phrase occurs "And let it not be permitted to add anything to, or take anything away from these agreements. . . ." Yaron points out that this phrase reflects a practice of ancient Near Eastern treaties and suggests that the Romans may have adopted it from the Carthaginians, with whom they and the Etruscans had already made treaties at an earlier date.[100]

The next shows international relations affecting internal constitutional law. According to Yaron the early use of the term *iudex* (judge) as title of the Chief Magistrate at Rome and the curious feature of there being two concurrent holders for a one-year tenure is a copy of the Carthaginian practice with their Chief Magistrate, also called "judge" (*sufes*).[101]

But Yaron's researches lead us even further into the realms of internal law and beyond the point where any specific connection can be shown. Yaron demonstrates that the phrase *vitae necisque potestas* has parallels in equivalent terminology throughout the ancient Near East, referring to a king's power of pardon: "power to put to death—power to keep alive." He concludes that the Latin phrase must originally have referred to a father's power of pardon when his son was guilty of some capital offense, and not to an arbitrary right to kill as later authors assumed.[102]

It is true that Yaron is careful to disclaim a connection between the Eastern concept and the Roman phrase: ". . . not because it is in itself impossible or unlikely, but rather because there is no evidence available to establish it."[103] Such scholarly caution is certainly called for in an isolated case,[104] but if the parallel in question can be seen to be part of a wider pattern,[105] and if a context exists in which the transmission of legal ideas is

known to take place, then it is no longer necessary nor is it satisfactory to ascribe the phenomenon to mere coincidence or some presumed deterministic development.[106]

FORM

Were one unaware of their provenance, then one would have no hesitation in assigning the Twelve Tables, with their casuistic style and their lack of any abstract categories or definitions, to the same literary genre as the ancient Near Eastern law codes. At most, it might be argued that with their somewhat mixed style, they are more akin to the provincial codes such as the Covenant Code and Codex Eshnunna than to the classical works of the Mesopotamian heartland such as Codex Hammurabi.

We have seen that the factor connecting the ancient Near Eastern codes is a common scientific tradition, which is ascertainable from internal evidence when the evidence is set in the context of the diffusion of Mesopotamian civilization.

Early Rome lay on the periphery of this civilization, was in contact with it, and was subject to its intellectual influence in such spheres as religion and law. Given this context, we submit that the Twelve Tables were a product of that same Mesopotamian scientific tradition.[107] In consequence:

a) Like the other codes, the Twelve Tables were initially a scientific treatise on law; that is to say, they were descriptive, not prescriptive. They were not legislation in the classical sense and certainly not a reform measure called into being by particular historical events.[108]
b) The method of logic employed will have been the same as in the other codes. The individual provisions should be interpreted in this light, i.e., as aspects of scholarly problems, and not as general principles or as the response to putative evils in a previous system.
c) It is doubtful whether a specific date can be assigned to their composition. The Mesopotamian tradition was in essence an oral one transmitted through discussion and learning in schools,[109] and the Near Eastern influence on Rome, whether via Etruria, Greece, or Carthage, had existed since before the Republic. The idea of a specific mission or teacher seems to us more akin to the spirit of later times. It is possible that the actual writing down of the code in its final version was a datable event, as in the case of Codex Hammurabi.[110]
d) It is most unlikely that Mesopotamian science would have determined the form of the code alone, without influencing its content. While some of the content will have been the product of local intellectual

activity and based upon local legal traditions, some will have been taken from the canon of scholarly problems. If such cases can be identified in the Twelve Tables, it would serve to confirm our thesis. It is to this aspect, therefore, that we now turn.

CONTENT

Yaron has already pointed to two cases where reference to ancient Near Eastern sources elucidates an obscure phrase in the Twelve Tables. Thus the phrase *res suas sibi habeto* ("let her keep her own property") in IV 3 does not regulate the formalities of divorce but, on the basis of parallel provisions in divorce settlements from widely scattered *loci* in the ancient Near East, the property rights of the wife ancillary to divorce.[111] And the phrase *si adorat furto* ("if one brings an accusation of theft") in VIII 1 refers not to the theft itself but to a false accusation of theft, a legal problem which is found in CH 1–4 and Deut. 19:16–21.[112]

We wish to consider two further cases, where a tradition can be traced through several ancient Near Eastern codes and can elucidate the Roman law on the assumption of its continuation into the text of the Twelve Tables. They are, it must be emphasized, both fragments of larger problems which could equally be used for this purpose but whose size and complexity would require a separate study.

T. VIII 4 reads: *Si iniuriam faxsit*, *viginti quinque poenae sunto*—"If he does *iniuria*, the penalty is 25 (*asses*)." The term *iniuria* causes considerable difficulty. In the classical law it refers to the delict of outrage—an insulting attack on a person's honor whether physically or by some other means. In the original text of the Twelve Tables, it was but the third of a triplet of delicts, the first two involving serious physical injury (*membrum rup*[*s*]*it* and *os fregit*, the breaking of limb or of a bone) and carrying the considerably heavier penalties of *talio* and 300 *asses* (150 for a slave) respectively. Gaius (*Inst.* III 223) interprets *iniuria* to include these two, explaining that the penalty of 25 applies to "other outrages" (*ceteras . . . iniurias*), but this is clearly a reinterpretation, not least because it involves re-phrasing the text.

What, then, was the original delict? Like most provisions of the Twelve Tables, this problem has attracted a large body of scholarly literature. The dominant view seems to be that *iniuria* referred to minor physical assaults, if only to make the triplet of delicts cover the whole field of physical injury.[113]

This interpretation causes two problems vis-à-vis the classical meaning of *iniuria*. Firstly, the developed delict was understood as outrageous insult,

an attack on a person's character or feelings, whether by physical assault or some other means. Secondly, *iniuria* in adverbial use already in the Lex Aquilia had the much wider meaning of any unlawful or wrongful act.

Attempts have been made to resolve the second problem by attributing the wider meaning to the provision in T. VIII 4. Thus Simon argues that the early legal system knew only acts of violence, self-help, which were qualified either as justified (*ius*) or unjustified (*iniuria*).[114] By the time of the Twelve Tables *iniuria* is the residue of violent acts which has not received a more specific designation (i.e., *membrum ruptum*, *os fractum*) and thus by a process of elimination minor acts of physical violence.[115] Halpin[116] suggests similarly that the phrase *iniuria alteri facere* meant "to do wrong to another," but that in the unsophisticated conceptions of that early period wrong was understood only as a direct physical assault.[117] Birks,[118] relying on the wider meaning of *iniuria*, goes so far as to deny the general consensus as to physical assault. The provision rather refers back to the two previous delicts and imposes the light penalty of 25 *asses* on a victim of one of those delicts who retaliates "*unlawfully*" (*iniuria*), i.e., not within the bounds of revenge or ransom[119] laid down by the statute.[120] Little attention, by contrast, is given to the discrepancy between the delict's early meaning of injury and later one of insult. This is presumed to be a natural development in the law from a primitive to a more sophisticated stage. Only Simon reflects that an unjustified act of violence contained an element of *hubris* which might be of more significance than the injury done.[121]

We shall not enter into a detailed discussion of the various theories, since it is their approach with which we would take issue. The method that they share can be described as follows: having gleaned a particular interpretation of the early rule from hints and allusions in the classical sources, conjectures are made as to the character of "primitive" law. It is then shown how the particular interpretation advocated would fit a system of that character. The difficulty with this method is that it lacks any empirical basis. The primitive systems described are hypothetical constructions with no demonstrable basis in reality. Thus Simon postulates a system concerned solely with classifying acts of violence as offenses or remedies,[122] Birks a system of retaliation and counter-retaliation with appropriate sums by way of ransom for the two stages,[123] while Halpin assumes that indirect harm "would have been alien to the primitive jurisprudence of that time."[124]

The systems thus created are usually internally consistent and reasonable[125] and may in some details have reflected primitive reality, but it is impossible ever to know for certain since they contain no shred of evidence from that

reality. Consequently, one theory can follow another, each re-arranging the "classical" evidence[126] according to a new model of primitive law, without ever breaking out of the circle of unsubstantiated hypothesis.

The evidence for the ancient Near Eastern legal systems comes for the most part from sources that are both primary and contemporary with the law that they describe.[127] They provide us from the outset with working models of "primitive" law from which we can draw empirical evidence and thus reduce the scope of hypothetical models. But they do more than this. For the theory that we have proposed is not one of comparative law but of an actual connection between the ancient Near Eastern codes and the Twelve Tables. Where a tradition can be traced through the former into the latter, it will also provide an objective criterion for determining which elements in the later sources, if any, reflect the early law. It enables us in short to follow a chronological method, rather than the practice of the authors discussed above, which is the opposite.

In the case of *iniuria*, at least, the ancient Near Eastern sources enable us to confirm a later tradition. We have noted that the classical law associated *iniuria* with the idea of insult. This notion has been rejected for the early law, both because early Romans were supposedly impervious to insult[128] and on the more weighty grounds that the context is one of physical assault. But there is one case where physical assault results not in injury but only in insult: a slap in the face. And this is exactly the meaning given to the delict in the famous story of Lucius Veratius (as told by the jurist Labeo)[129] who went around slapping people's faces with the flat of his hand and promptly paying them the sum of 25 *asses* demanded by the Twelve Tables, relying on the effects of inflation which had made a mockery of the penalty. It is generally assumed by modern scholars that this story gives but one example of a minor assault, but this type of assault is special in that no injury results for which compensation should be paid, and we see no reason to extend the bounds of the delict beyond the bare facts of the story.

All the ancient Near Eastern codes that discuss physical injury at length do so in the form of lists of the more serious injuries classified either by the part of the body affected (ear, nose, bone, etc.) or by the type of injury inflicted (e.g., burning, cutting). To each injury is assigned the appropriate penalty, which is either talionic or a tariff of fixed payments.[130] Non-permanent injuries are treated differently, as we have seen, the main consideration being compensation for work lost and medical fees. Two codes, however, include with the list of permanent injuries a slap in the face. CH, after considering the gouging of an eye, the breaking of a bone, and the knocking out of a tooth, continues:

202: If an *awīlum* slaps the face[131] of an *awīlum* who is older than he, he shall be struck with 60 strokes of an ox-hide whip in the Assembly.

203: If the son of an *awīlum* slaps the face of the son of an *awīlum* who is like him (in age), he shall pay 1 mina of silver.

204: If a *muškēnum* slaps the face of a *muškēnum*, he shall pay 10 shekels of silver.

205: If an *awīlum*'s slave slaps the face of the son of an *awīlum*, they shall cut off his ear.

Since this is an offense against honor, the relative social standing of the parties is a significant factor and allows CH to give free rein to its obsession with status, developing the discussion through ever more subtle gradations. (The basic distinction between *awīlum* "a gentleman" and *muškēnum* "a commoner" has been noted above, n. 81.) The general approach that emerges is that slapping the face of a superior is a serious matter; slapping an equal less so.

CE is less concerned with such distinctions and anchors the offense firmly in the context of permanent injuries:

42: If a man (*awīlum*) bites the nose of a man and severs it, he shall pay 1 mina of silver; an eye—1 mina; a tooth—½ mina; an ear—½ mina; a slap in the face—he shall pay 10 shekels of silver.[132]

43: If a man severs a man's finger, he shall pay ⅔ mina of silver.

44: If a man knocks a man down in a . . . and breaks his arm, he shall pay ½ mina of silver.

45: If he breaks his leg, he shall pay ½ mina of silver.

46: If a man strikes a man and breaks his collarbone, he shall pay ⅓ mina of silver.

It should be noted that although the offense does not occur in the biblical codes, it was probably also part of that scholarly tradition. The Mishnah, although a post-biblical source, preserves many oral traditions that failed to find written expression in the Bible.[133] In *Bava Qamma* 8.6, in the context of personal injury, it discusses the same question with a piquant variation: "If he slaps him (in the face), he pays him 200 *zuz*; with the back of his hand—he pays him 400 *zuz*." Thus there existed in the ancient Near Eastern codes a tradition whereby a mere slap in the face was included in the list of injuries which made up the scholarly discussions of assault. The level of the penalty varied from code to code, but at least as between equals it was regarded as less serious than actual injury.

T. VIII 2–4, with its list of serious injuries plus *iniuria*, was a continuation of the same tradition. *Iniuria* already then meant insult, but insult in

the physical form then recognized by law[134]—a slap in the face.[135] It was therefore a technical term, different in meaning and use from the adverbial form. If in the result T. VIII 2–4 does not cover the whole range of physical injury, then it is in perfect accord with the other codes.[136] One of the main points of our argument, it will be recalled, was that it is anachronistic to seek comprehensive statements of the law in the Twelve Tables.[137]

The second case that we wish to consider is that of *furtum conceptum* (a theft revealed after a search). The problem is well known: according to Gaius, the *actio furti concepti* lay against a person on whose premises stolen goods had been found after a search in the presence of witnesses, even if that person was not the thief (*Inst.* III 186).[138] The Twelve Tables provided a three-fold penalty under this action (*Inst.* III 191).[139] Equally according to the Twelve Tables, however, if stolen goods were found on a person's premises after a ceremonial search *lance et licio*,[140] it was regarded as manifest theft, with the appropriate penalties for that offense (*Inst.* III 193–194). By Gaius' time only the *actio furti concepti* existed, but it cannot be concluded that this action was a subsequent replacement for the search *lance et licio*, in view of Gaius' express statement that the action was included in the Twelve Tables. Since he was familiar with the text of the Twelve Tables, Gaius could not have made such an obvious error.[141]

How then is the existence of two different searches in the Twelve Tables, with two different penalties, to be explained? There are three leading theories.

According to De Visscher,[142] there was only one search at the time of the Twelve Tables (*lance et licio*), but with two consequences, depending on whether the householder was the thief (*furtum manifestum*, in which the thief was caught red-handed) or an innocent receiver (*conceptum*). This in turn depended on whether there had been an immediate hue and cry leading to the premises or some comparable indication of guilt.[143] When *lance et licio* was later abolished, the penalties of *furtum manifestum* disappeared with it.[144]

Daube, on the other hand, considers that there were two searches.[145] The first was informal and led to three-fold damages if stolen goods were found. If, however, the householder refused to allow a search, recourse was had to the more ceremonial form, *lance et licio*, with a corresponding escalation in the potential penalty.

Pugsley agrees that there were two searches but offers a different rationale.[146] *Furtum manifestum* originally depended not on the mode of theft but on its object, namely *res mancipi*.[147] A search for *res mancipi* required a ceremonial form, *lance et licio*, in view of the seriousness of the consequences.

The search for *res nec mancipi* need only be informal and the potential penalty was correspondingly lower.

Our remarks above as to method apply equally here. All three theories rely in varying degrees on the combining of allusions in the classical sources with conjectures as to the "primitive" law. De Visscher, at least, does bring some comparative evidence for the primitive state of the law (from medieval statutes),[148] although none of his sources involving hot pursuit, etc., mention anything about ritual search. Nor does he explain why the dual penalty should not have survived the abolition of the search *lance et licio*, since under his system it was the hot pursuit and not the form of the search which was decisive as to the penalty. Daube assumes that in the primitive law the householder who had resisted an informal search would not have dared to resist the ceremonial one or if he did, that the state would at this point intervene.[149] But he offers no empirical evidence to support these conjectures. Pugsley's conjecture as to the primitive law may have some basis, since there is plenty of evidence from early systems (not only in the ancient Near East) that the penalty for theft could vary with the object stolen (although Pugsley himself does not refer to this evidence). But that is far from making the theft of *res mancipi* "a heinous offense," a proposition for which he offers no evidence.[150]

The ancient Near Eastern legal tradition contained a classic scholarly problem on theft. The solution differed from system to system, but the problem remained essentially the same. Let us begin with the exposition in CH 9–12:

> 9: If a man whose property is missing seizes his lost property in the hands of a man, (and) the man in whose hands the lost property is seized says: "A seller sold it to me (and) I bought it in front of witnesses," while the owner of the lost property says, "I shall bring witnesses who know my lost property"—then the buyer shall bring the seller who sold it to him and the witnesses in whose presence he bought it, while the seller shall bring the witnesses who know his lost property. The judges shall examine their case. The witnesses in whose presence the purchase was made and the witnesses who know the lost property shall declare their knowledge before the god. The seller is a thief; he shall be put to death. The owner of the lost property shall take his lost property. The buyer shall take the money he paid from the estate of the seller.
>
> 10: If the buyer does not bring the seller who sold it to him and the witnesses in whose presence he bought it, while the owner of the lost property brings the witnesses who know his lost property, the buyer is a thief; he shall be put to death. The owner of the lost property shall take his lost property.

11: If the owner of the lost property does not bring witnesses who know his lost property, he is a liar; he has made a false accusation. He shall be put to death.

12: If the seller had died, the buyer may take five-fold the claim of that very case from the estate of the seller.

To begin with, it is necessary to explain an obvious contradiction within the text. According to paragraph 9, the innocent purchaser receives back only his purchase price from the seller/thief, whereas in paragraph 12, the apparently irrelevant circumstance of the seller/thief having died in the meantime results in his receiving five-fold damages.

This contradiction is compounded when we look at the other paragraphs on theft in CH. According to CH 8:

If a man steals an ox or a sheep or an ass or a pig or a boat, if it belongs to a god or to the palace he shall restore thirty-fold; if it belongs to a subject he shall restore ten-fold. If the thief has not the means to pay, he shall be put to death.

The penalty for theft is multiple damages instead of death, which applies only if the thief is unable to pay.[151] The resolution of these discrepancies lies in part in the substantive law of theft and in part in the techniques of Mesopotamian science.

Throughout the ancient Near East, theft (like other serious delicts) gave rise to a two-fold right for the victim.[152] In principle, he could take revenge on the thief by having him killed,[153] or, in the alternative, accept ransom for the thief's life. In practice, however, the courts had long since intervened to bar this type of revenge in all but a few aggravated cases such as kidnapping or armed robbery. Instead, they imposed a fixed ransom, usually a multiple of the stolen thing (according to the nature and circumstances of the theft), and only if the thief failed to pay the ransom did the residual right of revenge revive, as in CH 8.

CH 9–11 bears all the marks of a theoretical discussion. A triangular situation, between owner, purchaser, and thief/seller, is reduced to its simplest form, with three basic variations being dealt with in turn: if the seller/thief is guilty, if the purchaser is guilty, if the owner is guilty. The solution is neatly balanced and altogether too ideal, particularly in the first case. The two innocent parties are able to recoup their loss, the owner from the purchaser and the purchaser from the seller/thief. In practice of course, the situation is seldom so convenient: the thief will have disappeared or be insolvent, and one of the innocent parties will have to bear the loss.

The discussion is so theoretical because CH is trying to convey a point of principle, namely, that where there are two innocent parties who stand to lose, the primary loss will fall on the purchaser. He is strictly liable to the owner for the consequences of the purchased goods being stolen and bears the risk of being unable to recoup his loss from the seller. Since it could not express this principle except by way of examples, CH tried at least to make the discussion as abstract as possible by removing all extraneous details. Thus the question is discussed in paragraphs 9–11 in terms of the theoretical law (death for the guilty party) and not the law in practice.

The moment the discussion moves away from the question of principle to its practical application, then the multiple penalties reappear. CH 12 reflects the combination of the principle of purchaser's strict liability vis-à-vis owner (tempered by his right to recover from the seller) with the rule of multiple damages. The innocent purchaser is being allowed to recoup the payment of multiple damages which he himself has had to make to the owner. "That very case" is the one in which the owner has succeeded in extracting from the purchaser not only restitution of the stolen goods but also multiple damages.

Thus the multiple damages system applied as much to the purchaser of stolen goods, albeit innocent, as to the actual thief. And the documents of practice provide us with evidence of this very system at work. According to *MVN* 3 219:[154]

> Bukanum the merchant bought from DINGER.E and Idi-ilum 3 sheep, their purchase price being 1½ shekels 15 grains of silver. Nahshubal was the guarantor. These sheep were "turned into" stolen sheep. Bukanum and Nahshubal were "turned into" thieves. Seven shekels of silver were paid for the crime committed regarding the sheep. 1½ shekels 15 grains of silver were paid as purchase price for the sheep. DINGER.E and Idi-ilum have been made obligated to Nahshubal to restore (the money paid). (To do so they have sworn by the life of the king.) (Witnesses, date.)

Bukanum, the merchant, is very clearly an innocent purchaser of sheep, which are later found to be stolen property. He has been found guilty of "theft" in this extenuated sense and has had to restore the sheep to their owner. Most probably he, or rather his guarantor, also had to pay the fine of seven shekels of silver. As the document is not at all interested in this stage of the case, it is simply summarized by the words "turned into a thief." The second stage is that the purchaser recoups from the guarantor the price he had paid and perhaps the seven shekels if the guarantor did not pay it directly. The machinery of payment is not described, since the document is

only interested in the fact that the sums have been paid. The third stage, that with which the document is actually concerned, is the obligation of the sellers to restore the money to the guarantor.

The innocent purchaser has had to pay multiple damages to the owner, albeit at a rate (5 times) lower than that imposed on a thief (10 times). He now seeks to recoup this sum from the seller, only to discover that the seller has died in the interim. He can nonetheless recover his payment from the seller's estate, a right which still leaves him with the risk of the latter's insolvency.

In summary, theft is presented in the above scholarly problem as a three-cornered affair, involving the owner, the thief who is also the seller, and the receiver of the stolen goods from him. The law applied is that the latter is strictly liable to the owner for multiple damages but may recover the same amount from the seller.[155]

The three-cornered presentation of theft is continued in the Middle Assyrian Laws, Tablet A, paragraphs 3–6. It is all the more noticeable, since these paragraphs are not concerned with theft in general but with the special position of a married woman.[156]

Paragraphs 3–4 concern the case of a woman who steals from her husband and passes the stolen goods to a receiver. The laws consider the liability of both wife and receiver;[157] indeed a certain linkage is established between their punishment. Paragraph 5 considers the case of a wife who steals from another man.[158] Here there is no mention of any passing of the goods, but the paragraph is nonetheless shown to be but one side of the coin by that following,[159] which considers the strict liability for theft of a mere depositee from the wife. Even when the theft is dealt with from this oblique angle, therefore, the three-cornered pattern is imposed upon it.

Although it plays a key role in the relevant provisions, the three-cornered pattern is less evident in the Hittite Laws. This is due to two factors. Firstly, these laws use a slightly different technique to CH: where CH attempted to compress the problem into the most theoretical examples, adding only a few practical examples at the end, HL expands the problem into the most detailed discussion, considering every variation both by type of goods stolen and the nature of the receiving. Secondly, HL shares a stylistic characteristic of the provincial codes (as opposed to the central Mesopotamian codes such as CH and CL), namely, an extreme terseness in identifying the parties involved, often omitting to indicate change of subject from one clause to another.

HL 57–71 deal with theft of animals and related offenses and may be divided into several categories:

1. Ordinary theft. This is characterized by the phrase "if someone steals. . . ." There are three levels of penalty, depending purely on the type of animal stolen. The somewhat complex provisions as to type of animal may be schematized as follows. Paragraphs 57–59 deal with the most valuable animals, the examples given being a bull, a stallion, and a ram. The penalty is fifteen-fold restitution. Paragraphs 63–65 deal with less valuable animals, a plow-ox, a cart-horse, a goat, and certain species of sheep. The penalty here is ten-fold restitution. Paragraphs 67–69 deal with a cow, a mare, and certain other species of sheep. The penalty is six-fold restitution.
2. The fraudulent finder. Here a different act is described: "If someone finds a . . . and 'cleans' it (i.e., removes the marks of ownership) and its owner identifies it. . . ." Paragraphs 60–62 mention a bull, a stallion, and a ram, i.e., animals in the first category of theft, and impose a penalty of seven-fold restitution, which is approximately half of that for stealing the same animals. Although the finder committed a fraudulent act designed permanently to deprive the owner of his property, he did not actively take away the property, and this is apparently regarded as a mitigating circumstance. Note that the owner here has succeeded in proving that the animal is his and that the ownership marks were removed by the present possessor.
3. The negligent finder. This category is represented by paragraph 71, which begins "If someone finds a horse, a donkey, an ass . . ." His duty is to report it to the authorities, in which case "if its owner finds it he may rightfully (*sakuwassar*) take it, but he may not seize him as a thief." The owner's proprietary right is therefore established, but a right to multiple damages is denied. On the other hand, if the finder does not inform the authorities, the text declares him to be a thief.

   The text does not say what the consequences are of being a thief in these circumstances, but this and other significant details are provided by a later version of the same paragraph. There the finder must have the find witnessed, or else he will be considered a thief if the owner finds it. His penalty in that case is three-fold restitution. This version adds to the list of lost property an ox, a sheep, and even utensils, which shows that the list is meant to indicate any lost property: the size of the penalty does not depend on the nature of the property as in ordinary theft or fraudulent finding.
4. Innocent possession. Paragraph 66 concerns various types of animals, large and small, which wander over to another herd. The

owner of the herd is entirely innocent and accordingly, "if its owner finds it he may rightfully take it, but he may not seize him as a thief."

5. Paragraph 70 reads: "If someone steals an ox or a horse or a mule or an ass (and) its owner identifies (*kanes*) it, he may rightfully take it. In addition he shall pay two-fold."

In spite of appearances, the person paying the two-fold damages is not the thief. The penalty for theft is much higher: six-, ten-, or fifteen-fold. And the list of animals is the same as for the negligent finder, where we noted that the content of the list is of secondary importance.[160]

Closer analysis of paragraph 70 reveals that it has this special characteristic: it combines the phraseology of the theft paragraphs with that of the finder/possessor paragraphs. From the former it has "if someone steals" and the multiple restitution provision. On the other hand, "If its owner identifies it" comes from the realm of the fraudulent finder, not the thief, while the statement "he may rightfully take it" is altogether out of place in theft, where there could be no doubt as to the owner's right vis-à-vis the thief. The phrase is only found in cases of innocent possession, where the dispute is rather as to ownership between two innocent parties than as to culpability for theft or fraud.

The unidentified person who has to pay two-fold is therefore the innocent receiver of the stolen animals. The thief stole them, removed their identifying marks and sold them to an innocent purchaser. The owner nonetheless manages to identify them as his property and is therefore entitled to their return, even though their present possessor can equally prove innocent acquisition. And in addition, the latter must pay multiple damages.

The principle is therefore the same as in CH. The innocent purchaser is strictly liable to the owner for the penalty for theft, and must recoup his loss from the seller/thief as best he can. And as in CH, the multiple damages paid by the innocent purchaser are lower than those payable by the original thief—his innocence is admitted as a mitigating factor. The possibility of his recouping this payment from the seller/thief is not mentioned, but it is reasonable to assume that some similar rule to this effect existed.

Our final source for this problem is the Covenant Code, which shares the terse provincial style of the Hittite Laws but is drastically more sparing in detail. Exod. 21:27 reads: "If a man steals an ox or a sheep and slaughters or sells it, he shall pay five oxen for the ox and four sheep for the sheep." Exod. 22:3 continues:[161] "If the stolen item—from ox to ass to sheep—is found alive in his hand, he shall pay two-fold."

In Exod. 21:27, where the thief has slaughtered or sold the animal, he faces multiple damages according to the type of animal, as in HL 57–59, 63–65, and 67–69. The point of the slaughter or sale is to show that the original thief is meant: the animal is no longer in his possession, and his crime has been proved by circumstantial evidence, such as the testimony of the buyer, as in CH 9.

In Exod. 22:3 it is not the same original thief who is the subject but the innocent possessor. As in HL 70, he is not expressly named but may be identified from the pattern of the discussion. Note that Exod. 22:3 shares two further features with HL 70: there is a longer list of animals than in the law on original theft, formulated in such a way as to indicate that the type of animal is unimportant since the penalty is uniform; and the penalty itself is a lower level of multiple damages than for original theft. As in HL, the possibility may well have existed of recouping the payment from the seller/thief, although omitted in the text.

We have thus managed to trace a scholarly problem through four law codes and to show that the same basic law underlay them all. That this would not at all be apparent from a superficial reading of the texts is due to the vagaries of Mesopotamian scientific technique and the local variations in its application.

This same problem, we submit, continues into the Twelve Tables, in the form of the *actio furti concepti* and *oblati*, and reflects the same law, namely, the strict liability of the receiver of stolen goods, albeit innocent, to pay multiple damages to the owner, tempered only by his right to recover the same from the seller/thief, as in CH.

The element that is missing from all four examples from the ancient Near East is the search. It may have been a possibility, but all these laws are unconcerned with the question of how the owner found his stolen goods; it is the fact that he can identify them in the possession of the receiver which is important. The same, in our view, applies to the *actio furti concepti*. Contrary to the impression given by Gaius, there was only one search in the Twelve Tables, *lance et licio*, which was directed against the thief himself, probably after a hue and cry, as De Visscher surmised.[162] *Furtum conceptum* was a different problem, that of strict liability for receiving stolen goods, to which the search procedure was irrelevant.[163]

In this light, Gaius' description of the law is perfectly understandable. Gaius states (*Inst*. III 191) that a penalty of three-fold damages for a *furtum conceptum* is found in the Twelve Tables, as it undoubtedly was. Gaius' account can be accepted as accurate on this point, since he had access to the actual text. The same is not true, however, of Gaius' account of the legal

practice forming the substance of *furtum conceptum*. A little earlier (*Inst.* III 186) he describes the content of that action "as it was in his day," i.e., including a search. It does not follow (and to his credit Gaius does not actually say so expressly) that the "content" was the same at the time of the Twelve Tables, when the search *lance et licio* existed. The obvious time for the change in content was when the search *lance et licio* went out of use. To fill the gap a more modern procedure, *quaestio* before witnesses, became attached to the *actio furti concepti*, which thus lost some of its original rationale.[164]

The disparity between the original nature and meaning of the Twelve Tables' provisions on the one hand, and later Roman jurists' understanding of them on the other, was not simply the result of the passage of time or of development in the law. The Twelve Tables were the product of Mesopotamian science, then the dominant intellectual force in the Near East and Mediterranean basin. At some point in the history of the Republic, however, Mesopotamian science was replaced by a scientific method developed by the Greek philosophers, and the Roman jurists, having once adopted this new method, became divided from the old texts by an unbridgeable intellectual gulf. They could no longer look at the Twelve Tables with the same eyes as those who had drafted them.

An instructive example can once again be gleaned from Eastern sources; this time not because of any connection, direct or indirect, but merely by way of comparison. The two biblical law codes, the Covenant Code and the Deuteronomic Code, were, as we have seen, part of the Mesopotamian scientific tradition. In the eyes of post-biblical Rabbinic jurists, however, they were something entirely different. They and the other rules found in the Pentateuch were regarded as legislation, enacted at a particular historical juncture in response to charismatic events (by divine proclamation on Mount Sinai after Israel's exodus from Egypt). Together with other law supposedly promulgated orally at the same occasion, they formed a comprehensive code which was to be the fount and origin of all Jewish law.

Unconsciously applying Greek scientific method, the Rabbis proceeded to interpret the content of the biblical codes accordingly. The Covenant Code contains a series of laws on damage to persons or property. Exod. 21:28–32 reads:

> If an ox gores a man or a woman and they die, the ox shall be stoned and its flesh not eaten, but the owner of the ox shall be clear. But if the ox has been accustomed to gore in the past, and its owner has been warned but has not guarded it, and it kills a man or a woman, the ox shall be stoned, and its

> owner shall also be put to death. . . . If it gores a son or a daughter, it shall be done to him according to this rule. If the ox gores a male slave or a female slave, the owner shall give their master 30 shekels of silver and the ox shall be stoned.

Here is a typical scholarly problem dealt with according to the techniques of Mesopotamian science. The original question of liability is expanded by changing the status of the victim: man, woman, son, daughter, slave.[165] The following law also considers oxen, but the association is material, not legal. Exod. 21:33–34 reads:

> If a man opens a pit or a man digs a pit and does not cover it, and an ox or an ass falls into it, the owner of the pit shall make it good; he shall give money to its owner, and the dead beast shall be his.

The next law (vv. 35–36) returns to the question of the goring ox, but where the victim is another ox.[166] The discussion is again expanded by imposing the *scienter* test on the owner. There then follows a series of provisions on theft, after which the question of damage to property is raised again in two laws concerning responsibility for damage to crops. Exod. 22:5–6 reads:

> If a man causes a field or vineyard to be grazed over, or lets his beast loose and it feeds in another man's field, he shall make restitution from the best in his field and in his vineyard. If fire breaks out and catches in thorns so that the stacked grain or the standing grain or the field is burned, he that lit the fire shall make full restitution.

The same principle of liability for negligence can be discerned in these two laws, but it is expressed, as usual, only through isolated examples that give no hint of the limits of that principle.

Now let us compare the treatment of these disparate provisions at the hands of the Rabbinical jurists. The Mishnah, in *Bava Qamma* 1.1, reads:

> The four "fathers" (i.e., primary causes) of injuries are the ox and the pit and the grazing beast and the outbreak of fire. The ox is not like the grazing beast, nor is the grazing beast like the ox; nor is either of these, which have life in them, like fire, which does not have life in it; nor is any of these, whose way it is to go forth and do injury, like the pit, whose way it is not to go forth and do injury. What they have in common is that it is the way of them to do injury and that guarding them is your responsibility; and if one of them did injury, whoever did the injury must make restitution for the injury with the best of his land.

The scattered examples of the ancient text have been transformed into general categories which divide between them the whole field of injury, while common principles of liability and compensation are elucidated.

Not only would this reasoning be beyond the capacity of the original draftsman of the Covenant Code, but it changes the substantive meaning of the biblical text. As we have the original text we are in a position to compare, but were we forced to reconstruct it from the Mishnaic commentary, the result would, for all our efforts, be bound to look very different.

The method of reasoning reflected in the Mishnaic commentary may already have pervaded the *tripertita* of Sextus Aelius. It would certainly have been the basis of Gaius' commentary on the Twelve Tables. Small wonder then, that although he himself may have had the text before him, Gaius (and his fellow jurists alike) cannot reproduce for us its original meaning.[167]

Notes

My thanks are due to Professor Peter Birks of Edinburgh University, who read the first draft of the article and made many useful comments and criticisms. Responsibility for the opinions expressed herein rests, as usual, with the author.

1. For a summary of the controversy, see Schiller 1978: 153–155.

2. E.g., Crifò 1972: 118–121, 123; Kunkel 1973: 23–35; Jolowicz and Nicholas 1972: 14; Wieacker 1956: 472; 1967: 299; and especially Westrup 1950: 168–169, 176–182: ". . . a Magna Charta of the plebeian rights and liberties."

3. Daube 1956: 5–7. This difference is not affected by Daube's later argument (1956: 57–61) that the third-person singular forms in the Twelve Tables may have an impersonal sense.

4. Wieacker 1967: 321–322.

5. Gioffredi 1947–1948: 7–140, esp. 44.

6. This is not merely a question of their present fragmentary condition. As Wieacker points out, the impossibility of comprehensiveness can be seen from the near-contemporary Laws of Gortyn, the text of which has been preserved almost in its entirety (1956: 467). In 1967: 299 on the other hand, Wieacker speaks of comprehensive legislation by the Decemvirs, but without giving grounds for this change in his position.

7. Gioffredi 1947–1948: 7–140, esp. 44.

8. Kaser 1973: 523–546, esp. 539.

9. Kaser 1973: 524, 527–528, 533.

10. Kaser 1973: 524.

11. It can be argued that the provision is in one of the supplementary Tables, added against the will of the plebeians. But this again relies on an external story rather than the text, and it could equally be argued that the elaborate tale of the last two Tables, found in certain authors, was designed to cover their embarrass-

ment at the content of the text so flagrantly contradicting their account of its formation.

12. The argument that the prohibition on sumptuous funerals (e.g., Wieacker 1967: 313) was aimed against the high living of the aristocracy is an example of the dangers of uncritically accepting classical Roman interpretation. The claim is based on Cicero's remarks (*de leg.* 2.23.59-24, 61), but the picture given from those provisions preserved in the original is somewhat different. The prohibitions are on smoothing the funeral pyre with an axe (2 times), female mourners tearing their cheeks or making a certain type of lamentation (4 times), collecting the bones for a subsequent funeral (5 times), adding various things to the corpse, including gold (8 times). Apart from the gold, none of these prohibitions could possibly have anything to do with luxury. *Prima facie* they represent religious practices, the significance of which would have been lost on Cicero. One has only to compare the prohibition on Canaanite practices in Lev. 19:28: "You shall not make any cuttings in your flesh for the dead nor print any marks upon you. . . ." Compare further A. Watson's more sober assessment of all the evidence (1975b: 180–186).

13. Watson 1975b: 185. Ignorance should not be confused with uncertainty in the law, which would work to the detriment of patricians and plebeians equally. It is impossible to tell whether the extant rules resolved uncertainties, since all rules do so by their very existence. Neither comprehensive legislation nor even writing is necessary to establish certainty.

14. Westrup 1950: 108.

15. Westrup 1950: 186.

16. Müller 1903.

17. Müller 1903: 191–204, 210–211.

18. Müller 1903: 205–206.

19. Volterra 1937.

20. Volterra 1937: part II, 85–173.

21. Volterra 1937: 86.

22. E.g., David 1927; Koschaker 1917.

23. For example, Volterra's translation (1937: 99) of a key phrase in Codex Hammurabi 185 (*ina mêšu*) as *in suo none* is now known to be incorrect; see Yaron 1965: 171–183. Likewise Volterra's assumption that *riksātu* in CH 128 means a written contract (1937: 117): see Greengus 1969: 505–532. Volterra's statement that ancient Near Eastern law (as opposed to Roman law) used written modes of transfer (1937: 145) was inaccurate even when he wrote: see San Nicolò 1931: 162–163.

24. E.g., that early Roman law placed no restrictions on the right of the *paterfamilias* to alienate property (Volterra 1937: 138–139), or that it had execution against the person, not against his goods (Volterra 1937: 148).

25. Watson 1975b: 8.

26. See, e.g., Cicero, *de leg.* 2.23.59 (*lessus*).

27. E.g., the reinterpretation of *malum carmen* (T. VIII 1) into the delict of *famosus libellus*. Cf. Paulus *Sent*. 5.4.6: *introducta est lege XII tab. de famosis carminibus*. . . .

28. See n. 12 above.

29. ". . . nicht einzelne Bestimmungen, die da und dort in gleicher Weise entstehen können, sondern das schon feststehende in bestimmte Formen und Gruppen gebrachte Gesetz, das nur an einem Orte in der Fassung und Redaktion entstanden sein kann" (1903: 218).

30. Müller's suggestion that this "Urgesetz" was brought by Abraham to Canaan and thence to Egypt, where Moses became acquainted with it (1903: 219), might seem a little naive to us today. It appeared less so in the then state of biblical research.

31. Müller 1903: 188.

32. Though not exclusively, at least by the first millennium.

33. Akkadian was a Semitic language, better known by the names of the two main dialects that developed from it: Babylonian and Assyrian.

34. See Pettinato 1979: chap. 3.

35. The influence on Egypt was less, since the Egyptians had their own script and highly developed civilization. By the same token, Egyptian influence outside of its own territory was remarkably small, except in the small area of Western Asia that it intermittently held under its control. In the second millennium, Akkadian was the language of diplomatic correspondence, and the Egyptians used it even for communication with their own vassals in Canaan, having a scribal school at El-Amarna for this purpose.

36. The Hittite Empire flourished between the eighteenth and the end of the twelfth century B.C.E., when it was destroyed by the Sea Peoples. For a summary description, see Goetze 1957: 82–178.

37. Also, many of these traditions are found first in Sumerian—a non-Semitic language.

38. For a summary of the relations, see Goetze 1957: 64–81. Our documentation is mainly from the nineteenth century B.C.E.

39. See Goetze 1957: 171–174.

40. E.g., Jeremiah's objections to the cult of Ishtar (Jer. 7:18) and Ezekiel's disgust at women weeping over the death of Tammuz in the temple in Jerusalem (Ezek. 8:14).

41. E.g., Ezekiel uses categories known from a Babylonian reference work for priests. See Westbrook 1988c: 29 n. 102.

42. See, e.g., Weinfeld 1983: 95–129, esp. 119; and Westbrook 1986b: 393–398.

43. The oldest version is in Sumerian, and an Akkadian version was implanted into the Gilgamesh Epic. See *ANET* 42–44 (Sumerian version), 93–95 (Akkadian version).

44. Jacobsen 1984: 17–20.

45. Greenfield 1985: 13–20.

46. For "city-laments," see Gwaltney 1983. For "building stories," see Kapelrud 1963; and Hurowitz 1985.

47. See nn. 41 and 42 above; and Moyer 1983.

48. This and the following dates are very approximate. The law codes cannot be dated to a specific year, only to the reign of the king in whose name they were promulgated or by other external evidence. Furthermore, the chronology itself has not yet been settled. For convenience, we follow the chronological schema of *The Cambridge Ancient History*. For one view on whether Codex Ur-Namma should be attributed to his son, Shulgi, see Kramer 1983.

49. The biblical codes present a somewhat more complicated picture in that the original codes have been transplanted into another literary context and combined with material from sources of a different genre: thus they also contain moral exhortation, norms without sanctions, or with divine or sacral sanctions, and narrative. But this material is easily separated from the pure legal matter which formed the original code.

50. The Middle Assyrian Laws are a good illustration. They consist of a series of 14 tablets divided by subject matter, but the division is material, not legal. Tablet "A" (the only tablet fully preserved) is a collection of the most diverse laws, ranging from theft to witchcraft through marriage, inheritance, and murder, the only common denominator being that all relate in some way to women.

51. Thus the code discusses a false accusation of murder, but not murder itself.

52. Driver and Miles 1952: 41.

53. See below.

54. Driver and Miles 1952: 45.

55. See above, nn. 16 and 22.

56. Landsberger 1939: 219–234, esp. 227.

57. Kraus 1960.

58. Kraus 1960: 285. Kraus rendered *dināt mīšarim* "gerechte Richtersprüche." The word *dīnu* is a standard Akkadian term for the decision of a judge in a lawsuit.

59. Kraus 1960: 289.

60. Leichty 1970: 5–7.

61. Kraus 1960: 288–289.

62. The "scientific" nature of CH has been further elucidated by Bottéro, using the analogy of Mesopotamian medical treatises, which employ the same technique (1982: 425–435).

63. There are also administrative decisions, fixing the prices of commodities, services, etc.

64. It should be noted that the description is not always neutral; it can be phrased so as to emphasize a particular point of view. See Westbrook 1988c: 76–77.

65. This does not mean that it was purely an academic exercise. Mesopotamian science was applied science. For the use of law codes by the royal courts, see Westbrook 1985a: 247–264. For the close connection of the provisions of CH with the

law in practice, see Petschow 1984: 181–212. CH was a secondary use of this scientific material for a work of royal propaganda. See Finkelstein 1961: 91–104.

66. CH continued to be copied and re-copied in scribal schools both in Babylonia and elsewhere for more than a millennium after its original composition, but as a literary text. See the references in Westbrook 1985a: 253 n. 31.

67. On the diffusion of the omen-lists, see the most illuminating discussion and chart by Leichty 1970: 20–21.

68. CL 29: If an inchoate son-in-law enters the house of his father-in-law and gives the marriage-gift, and later they make him leave and give his wife to his friend, they shall give him double the marriage-gift that he brought. His friend shall not marry his wife.
CH 161: If a man causes the *biblum*-gift to be brought to the house of his father-in-law, gives the bride-money, and his friend slanders him and then his father-in-law says to the fiancé "You shall not marry my daughter," he (the father-in-law) shall return double everything that he brought to him. His friend shall not marry his wife.

69. CE 53: If an ox gores an ox and causes its death, both ox owners shall divide the price of the live ox and the carcass of the dead ox.
Exod. 21:35: If a man's ox gores his neighbor's ox and it dies, they shall sell the live ox and divide its price and also divide the dead ox.

70. See below.

71. See below.

72. For the earlier view see, e.g., David 1950: 149–178, and van Selms 1950: 321–327 (whose main argument was later shown to be based on an incorrect reading of the cuneiform text). For the current view, see Yaron 1966: 396–406, and especially Paul 1970: 102–105, where some of the traditions are collected, illustrating what the author calls "a vast juridical canvas which extended throughout the ancient Near East."

73. For a somewhat different, but excellent, exposition of this point, see Bottéro 1982: 431–432.

74. For the detailed steps in this process, see Westbrook 1985a: 258–264.

75. The tradition was probably oral: there is evidence that scholars traveled, but none that cuneiform texts (apart from letters) did. Texts found in provincial locations are invariably written in the local epigraphy. Our account is probably also something of a simplification. There may well have been more than one canon, and the canon or canons would have been organic entities subject to change and growth over the centuries, although it should be emphasized that the traditions, where they recur, reveal a remarkable conservatism.

76. While CH was copied outside of Babylonia as a scribal exercise, none of its provisions are reproduced literally in the other extant law codes.

77. As Bottéro (1982: 431) elegantly expresses it, ". . . comme l'on fait tourner entre ses doigts une babiole qu'on veut examiner sous tous ses angles" ("as one turns a jewel in one's hand in order to examine it from all sides").

78. The Hebrew term (*bĕtûlâ*) might mean "virgin." This is an age-old crux. For a detailed discussion, see Locher 1986: 117–238.

79. See Westbrook 1988b: chap. 2.

80. See Westbrook 1984: 753–754.

81. The terms *awīlum* and *muškēnum* are still the subject of dispute. Not least of the difficulties is that they are used relatively. The term *awīlum* can therefore mean a man (i.e., anybody), a head of household, or a "gentleman" (whether by wealth or social status is not clear). The term *muškēnum* can mean an ordinary citizen (as opposed to the king) or a "commoner" (as opposed to an *awīlum*), or simply a poor man. See Kraus 1973: 95–125.

82. A mina was worth 60 shekels.

83. The distinction in status is significant because of the practice of vicarious punishment. See Westbrook 1988c: 55–64.

84. See n. 81 above.

85. It must be stressed that the two examples presented here were chosen *inter alia*, for their relative simplicity; they do not require a detailed exposition of intricate substantive law or of textual or philological problems. For more complex problems, such as the goring ox or the death of a distrainee, see Westbrook 1988c: chap. 2. The examples used here are themselves, one should note, only part of wider scholarly problems.

86. For a general discussion of the problem of Etruscan origins, see Scullard 1967: 34–57.

87. Note, however, the point made by Ducos (1978: 60–61) that all concrete cases of Greek influence on the Twelve Tables are also found in the ancient Near Eastern codes. Ferenczy's thesis (1984: 2001–2012, esp. 2009) that the Twelve Tables were modeled on the code of Zaleucus of Locri is based on the merest generalities: (1) the tradition that the latter had been adopted by other cities in Magna Graecia; (2) both codes are concerned mostly with private and criminal law; (3) procedural law plays a large role in both; (4) the use of *talio*; and (5) both were concerned to uphold decent behavior (e.g., prohibition on luxury).

88. See, e.g., Ferron 1972: 189–191 and the literature cited therein.

89. Van Berchem 1967: 326–330; and Rebuffat 1966: 7–15.

90. Van Berchem 1967: 307–338.

91. Van Berchem 1967: 308.

92. Van Berchem 1967: 317–326. Hercules was represented dressed in the garments of a Phoenician priest; women were excluded from the cult; only bulls and heifers were sacrificed; it was forbidden to associate other gods with the sacrifice, contrary to the normal Roman practice of *generalis invocatio*; there was a holocaust sacrifice; neither dogs nor flies dared enter the sacred precincts, only priests; the god received a tithe as patron of trade (*pars Herculanea*).

93. For an edition of the Phoenician inscription, see Donner and Röllig 1973: 330–332 (Supplement). For an edition of the Etruscan inscriptions, see Heurgon 1966: 1–15. But see further Ferron 1972: 201–207.

94. They were allies in the battle of Alalia in 535 B.C.E. (Herodotus 1.166).

95. Rebuffat 1966: 18–19.

96. Or *cella*, according to Ferron (1972: 201).

97. Yaron 1974: 347–338.

98. Heurgon 1966: 15.

99. 6.95.2. Mentioned also in Cicero *pro Balbo* 53 and Livy 2.33.9.

100. Yaron 1974: 348–351. We might add that a further phrase in the *foedus Cassianum*—"so long as heaven and earth have the same place"—is reminiscent of the phrase in the Pyrgi inscription that the statue should stand "as long as these stars."

101. Yaron 1974: 351–354.

102. Yaron 1962: 243–251.

103. Yaron 1962: 248.

104. The Chinese T'ang Code (tenth century A.D.) contains provisions for the control of goring oxen and vicious dogs which are very similar to those of certain ancient Near Eastern codes. In such an isolated case, the explanation of two systems independently reaching the same solution to a common problem is obviously preferable to a search for possible connections. See MacCormack 1983: 132–150, esp. 147.

105. Yaron elsewhere provides two more examples, from the Twelve Tables themselves. See below.

106. As Watson puts it (1975b: 17): "It has never been shown that early law everywhere develops in the same way."

107. It is interesting to note at this point Leichty's remarks (1970: 14): "The closest parallels to Mesopotamian birth divination are to be found in the Hittite, Etruscan, and Roman civilizations. The Hittites borrowed their divination techniques directly from the Babylonians and many texts are simply copies or translations of the Babylonian originals." He continues (1970: 16): "There appears to be a strong cultural continuity from Mesopotamia to Rome via the Etruscans in the matter of birth divination. This same continuity is evident in extispicy and could be investigated with regard to other forms of literature with great rewards."

108. Our conclusion, albeit arrived at by a different route, is therefore similar to that of Stein (1966: 9–25), who considers the Twelve Tables to have been declaratory of *ius*. Nonetheless, there is still a difference between descriptive and declaratory. According to Stein (1966: 19), "Once a lex has been enacted, it recorded the law authoritatively and was intended to be as permanent as the ius which it stated." In our view, terms such as "enactment" and "authoritative" suggest a replacement of the common law rather than a guide to it and therefore seem to us less appropriate to the original nature of the Twelve Tables, although they undoubtedly came to assume this character later.

109. A faint echo of this tradition may be contained in Cicero's remark that the Twelve Tables had been part of the school curriculum (*de leg.* 2.4.9 and 2.23.59).

110. Not too much store should be set by the tradition of the Twelve Tables being drafted in response to popular pressure for publication of the law; it may

reflect a literary topos rather than an historical event. Hammurabi in the epilogue to his code boasts of the salutary effect of its publication (Col. XLVIII 8–19): "Let the oppressed man who has a case come before my statue, 'the king of justice,' let him have read to him my inscribed stela, let him note my precious words, and may my stela make the matter clear to him; may he recognize his case and set his mind at ease!" Likewise in the books of Exodus and Deuteronomy banal legal statements such as the prohibition of theft and murder are given special authority by their being written down on stone tablets in dramatic circumstances which purport to signify their origin as positive law (i.e., the Ten Commandments).

111. Yaron 1960: 1–12.

112. Yaron 1967: 510–524. For a different reconstruction, see Watson 1975c: 193–196. Without entering into the merits of the case, we would suggest that Watson's reconstruction imposes on the Twelve Tables reasoning more suitable to the time of Gaius.

113. E.g., Simon 1965: 163; Watson 1975a: 216.

114. Simon 1965: 145–147, 160–162.

115. Simon 1965: 169–175.

116. Halpin 1976: 344–354.

117. Halpin 1976: 351–353

118. Birks 1969: 163–208.

119. On understanding the penalties of 300 and 150 *asses* as such, see Birks 1969: 187–188.

120. Birks 1969: 188–190.

121. Simon 1965: 174–175.

122. Simon 1965: 160–162.

123. Birks 1969: 187–189.

124. Halpin 1976: 351.

125. Although as Birks points out (1969: 167–170), Simon's reconstruction does not work even within its own terms of reference.

126. Where the classical evidence is inconsistent, this often involves value judgments. Thus Simon dismisses the evidence of Gellius in one instance (1965: 156–157), while praising his accuracy in another (1965: 132–133). Birks is forced to question Labeo's reliability on the story of L. Veratius (1969: 174–178), although he appears subsequently to have modified that position (1974).

127. The exception is the Bible, but even there the received text shows all the signs of faithful transmission.

128. Jolowicz and Nicholas 1972: 171.

129. Gell. *NA* 20.1.13.

130. The difference between these two types of penalties is not as profound as it seems. See Westbrook 1988c: 45–47.

131. The Akkadian idiom is "strikes the cheek." Cf. the Latin formula of the *ao. iniuriarum* in the Edict: Quod Auli Agerii Pugno Mala Percussa Est, a

formula which is already reflected in Plautus *Asin*. II, 2, 104: *pugno malam si tibi percussero*. See further Lenel 1901–1903: 398.

132. 1 mina = 60 shekels.

133. See n. 42 above.

134. This has nothing to do with the primitive character or otherwise of the legal system: modern English law gives no remedy for verbal insult as such (as opposed to defamation).

135. The other two cases listed, *membrum ruptum* and *os fractum*, may also have constituted an affront to one's honor, but if so it was insult added to injury.

136. CH, for all its sophistication relative to the other law codes, has only eye, bone, and tooth.

137. Da Nóbrega (1967: 250–270), who refers to a variety of comparative ancient systems, appears to recognize the specificity of the provisions in T. VIII 2–4 (1967: 268–269), but his conclusion that "iniuria était bien plus une offense morale que physique" (1967: 270) remains a trifle too unspecific. From the comparative material adduced (1967: 259–263), he appears to consider that any insult would be included. Watson (1975a: 216) notes that *iniuria* to a slave is not covered by Chapter III of the Lex Aquilia and must therefore have meant injuries so minor as not to affect his market value or even give rise to medical expenses. It may equally be pointed out that a slave has no honor to be damaged by a slap in the face.

138. But with the possibility of recovery from the person who passed it to him under the *ao. furti oblati*.

139. And the same under the *ao. furti oblati*.

140. [This phrase refers to an archaic requirement that the search for stolen goods be conducted by the plaintiff wearing only an apron (*licium*) and carrying a tray (*lanx*) in both hands.—Eds.]

141. De Zulueta 1946–1953: 202. For the original meaning of *lanx et licium*, see Wolf 1970: 59–79.

142. De Visscher 1931: 217–253.

143. ". . . traces, délai, dissimulation . . ." (De Visscher 1931: 249).

144. De Visscher 1931: 223.

145. Daube 1947: 282–283.

146. Pugsley 1969: 139–152.

147. [A category of property that could only be transferred by means of a formal ceremony.—Eds.]

148. De Visscher 1931: 232–242.

149. Daube 1947: 282–283.

150. Pugsley 1969: 140. Acceptance of Pugsley's theory also requires us to dismiss all the classical sources as unreliable—which in itself is not impossible—but on the sole grounds that they do not comply with the theory.

151. Ten-fold damages is also the penalty in CH 265 for a dishonest shepherd who steals sheep by changing their brand and selling them.

152. The following is a summary of the more detailed discussion to be found in Westbrook 1988c: chap. 4.

153. It cannot be sufficiently emphasized that this had nothing to do with self-help. In all serious delicts, the court, having heard the case and decided on guilt and the appropriate penalty (where not obvious), then handed the guilty party over to the plaintiff for that revenge alone. Self-help was only justifiable as an *ex-post-facto* defense in certain limited cases, such as flagrant murder, armed robbery, and night burglary. Self-help (and the concomitant unrestricted revenge) was regarded as the antithesis of legal order. See Westbrook 1988c: 45–46.

154. Edition in Westbrook and Wilcke 1974–1977: 114–115.

155. The distinction between innocent and fraudulent receiver lay not only in the amount payable but in the alternative to payment: for the innocent receiver a simple debt; for the fraudulent receiver revenge, as for a thief. Hence the innocent receiver would sometimes still try to establish the identity of the seller, not to avoid all liability, but to avoid the consequences of fraudulent possession. See the cases in Westbrook and Wilcke 1974–1977: 116–118, as reinterpreted in Westbrook 1988c: 153 n. 60.

156. See n. 50 above.

157. §3: "If a man is sick or dead and his wife steals something from his house and gives it to a man or a woman or any third party, they shall put to death the wife and the receiver. If a married woman whose husband is well steals from her husband's house and gives it to a man or a woman or any third party, the man shall charge his wife and impose a punishment on her; the receiver who received the stolen property from the man's wife shall restore it, and they shall impose upon the receiver the same penalty as the husband imposed on his wife."

§4: "If a slave or slave woman receives anything from a married woman, they shall cut off the nose and ears of the slave or slave-woman, and they shall restore the stolen property in full. The husband shall cut off his wife's nose, but if he pardons his wife and does not cut off her nose, they shall not cut off those of the slave or slave-woman, nor shall they restore in full the stolen property."

158. §5: "If a married woman has stolen something from another man's house exceeding 5 mina of lead in value, the owner of the stolen goods shall swear: 'I did not let her have possession of it' and 'there has been a theft from my house.' If her husband agrees, he shall restore the stolen goods and redeem her, and cut off her ears. If the husband does not agree to redeem her, the owner of the stolen goods shall take her and cut off her nose."

159. §6: "If a married woman makes an outside deposit, the receiver shall be liable for the stolen goods."

160. A further difference is that all the paragraphs on ordinary theft record the fact that the penalty has been reduced (". . . formerly they gave 30 . . . now he shall give 15 . . .").

161. We have omitted the intervening law on the thief caught breaking in. This was another classic scholarly problem that the Covenant Code combined with the present problem. For the logic of the Covenant Code's presentation, see Westbrook 1988c: 154.

162. Note also that the two biblical parallels adduced by Daube (1947: 257–259), Laban's pursuit and search of Jacob's possessions and Joseph's of his brothers' (Gen. 31:22–35; 44:3–13), involve a hue and cry, and the search is directed against the original thief.

163. Daube in fact showed some awareness of this point in his analysis of the terminology (1947: 267–269). He surmised that the *ao. furti concepti* originally meant "an action because of stolen goods received" as the logical parallel to the *ao. furti oblate,* "an action because of stolen goods brought," i.e., that the essence of the offense was receiving the stolen goods. Daube ultimately rejected this interpretation, however, because of the weight of tradition (that of the classical Roman jurists) against it.

164. An interesting question, though not strictly relevant to our discussion, is why the innocent possessor should be punished more severely than a common thief. (It arises whether our interpretation is accepted or not.) Pugsley's suggestion that it covers the extra expense and trouble of a search (1969: 146) is not at all convincing: we know of no legal system where such considerations play a part in the level of punishment, and in any case catching the original thief and proving the case against him could be equally troublesome. We would provisionally suggest that here again is a case where Gaius' interpretation is misleading. His division of theft into two exhaustive categories, one (*manifestum*) being specific and the other (*nec manifestum*) residual, is anachronistic. The Twelve Tables certainly discussed *furtum manifestum*, but the mention of *furtum nec manifestum* in VIII 16 was not to a general category, but to a specific case where the theft was not manifest, as the Mesopotamian scientific method would lead us to expect. The less serious cases of dishonesty in the Twelve Tables (VIII 19, 20) with two-fold damages were taken by Gaius and others as illustrations of a general category of *furtum nec manifestum*. Hence the attribution of two-fold damages to all cases of common theft. In our view, the original penalty for common theft was a higher multiple. It may have varied according to the object stolen, but the most likely figure would be four-fold, i.e., that to which the penalty for *furtum manifestum* was later commuted. The grounds and the evidence for this proposition must await a more detailed study.

165. For a discussion of this particular scholarly problem, see Westbrook 1988c: 70–75.

166. See n. 69 above.

167. In conceding Gaius accurate knowledge of the text we may even be going too far, since any version before him will not have been in the language of the fifth-century original. See Nörr 1976: 497–604, esp. 535.

Restrictions on Alienation of Property in Early Roman Law

Abstract

This article seeks to demonstrate how an understanding of ancient Near Eastern law can help to elucidate early Roman law. Two conundrums from the Twelve Tables are solved by analyzing them within the context provided by Near Eastern legal practices involving redemption of land and release of slaves.

THE STARTING POINT OF THIS paper is a premise—the premise that certain legal traditions that were widespread throughout the ancient Near East found their way into the earliest Roman law.[1] To justify such a premise a great deal of evidence would be required, far beyond the scope of this paper, whose aim is therefore more modest. We intend only to show through two examples how the application of our premise can help to elucidate some of the more enigmatic provisions of the Twelve Tables and thereby demonstrate its feasibility.

The ancient Near Eastern traditions to which we are referring concern the law of property. The legal systems of that region contained special rules protecting the family (in the extended sense) from the danger of permanently losing its principal assets due to temporary economic difficulties.[2] Their purpose was to preserve the family as an economic unit by safeguarding its primary sources of income. Therefore only certain types of property

[Originally published in P. Birks, ed., *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford: Oxford University Press, 1989), 207–13. Copyright © Oxford University Press. Reprinted with permission, which we gratefully acknowledge.—Eds.]

were protected and the beneficiary was the family as a whole, rather than their immediate owner.

As to the types of property involved, we have positive evidence in the case of land, temple prebends, and slaves.[3] There is indirect evidence that large farm animals and boats were also included in this category, at least on occasion.[4] All these items, it will be noted, make up the core of the male inheritance.[5] The beneficiary of the rules might well be the original owner but was not necessarily so. If he were unable to realize his rights, then they passed to his potential heirs—sons, brothers, cousins—and in any case survived his death.

Two examples of these rules will serve: redemption of land and release of slaves. The former right was a conditional one: if land had been sold for less than its real value, a member of the seller's family could later force the present owner to resell it to him at the same low price.[6] Only purchase at the full value would allow permanent alienation of the land, because it would not prejudice the economic survival of the family. The important point for the law was to maintain the distinction between sale and pledge. If the owner of land pledged it against a loan, he retained the possibility of its return on repayment; if he sold it outright, this possibility was lost. If failure to repay the loan resulted in forfeiture of the land, the creditor had in effect bought the land at less than its true value, since the loan would seldom amount to anything like the full value of the land pledged to secure it. The right of redemption, however, gave forced sale by a debtor the status of pledge.

The buyer who purchased at the full price, on the other hand, needed evidence thereof in order to prevent the seller or his heirs from claiming the right to redeem at a later date. This was achieved at a ceremony in which the full price was weighed out and handed over before witnesses, and their testimony in turn was given greater longevity by a sealed document recording the ceremony and the witnesses present, which could ensure security of tenure for generations to come. As a sale document from Susa (MDP 22 44) puts it: "Not redemption, not pledge; full price. Like a father buys for his son, A has bought . . . [this property] for generations [i.e., for ever]."[7]

In the case of slaves, the right to redeem existed as with land, at least for certain categories of slave, and on the same conditions. But here there was an added factor: the slave might be a member of the seller's own family, or the seller himself. Accordingly, additional rules are found which effect the automatic release of such slaves after a certain number of years' service, when the debt was deemed to have been paid off by the slave's labor.[8] Again, the point was to distinguish between pledge, for which antichretic

contracts were common,[9] and outright sale in which all hope of freeing the slave would be lost. In the case of close members of the family or of self-sale, the laws assume that they would only be sold under dire circumstances of indebtedness.

We may now set out our premise in detail: the category of *res mancipi* in early Roman law was distinguished from all other property in that it was subject to similar restrictive rules as we have seen from the ancient Near East. The ceremony of *mancipatio* was designed to overcome these rules by evidencing sale *at the full value*, which, as we have seen, nullified the rights of the seller and his heirs. Failure to use *mancipatio* would not invalidate a sale but would leave the buyer without a guarantee of ownership in perpetuity, since there existed in theory at least the possibility of redemption, release, or the like at some future date. By classical times these restrictive rules had entirely disappeared, leaving only the *mancipatio* ceremony as an empty shell, an irksome formality that was applied automatically and without any rationale.

Now we turn to two examples from the Twelve Tables where this premise may be applied. The first is VI 1: *cum nexum faciet mancipiumque uti lingua nuncupassit*, *ita ius esto*.

It has justifiably been called a "strikingly clear yet strangely and intractably obscure clause."[10] A literal translation would be: "When he does *nexum* and *mancipium*, as the tongue shall have declared, so be the right." To take this as affirming the legal validity of whatever ceremony is used is not only too banal, but it offends against the literal sense, expressed by the enclitic *-que*, that *mancipium* and *nexum* are cumulative, not alternative. For on the face of it, they are not two possible examples from a long list, but the two components of a particular legal act.[11] Reluctance to regard them as such derives not from a close reading of the text but from considerations of legal logic. From the sparse information available we can conclude at least that *nexum* at the time of the Twelve Tables was a real obligation involving the pledging of a person as security for a loan. The person pledged was obliged to work for the creditor until the loan was repaid.[12] *Mancipium*, by contrast, was the outright alienation of property to a buyer. A slave thus sold would remain the buyer's property, and the seller could have no legal influence over his subsequent fate. Our literal rendering, then, would appear to contemplate the legally impossible: a transaction which combines pledge with outright alienation.

The paradox may be resolved, however, if we return to our basic premise and examine the ancient Near Eastern sources. There we find special types of contract which actually combine pledge and sale, but which are

explicable in the context of the rules protecting family property that we outlined above.

The most explicit examples come from the Middle Assyrian Period (fifteenth to twelfth century B.C.E.). Loan contracts are secured by various types of pledge, namely land, members of the debtor's family, slaves (e.g., *ARU* 46),[13] and in one instance an ox (*ARU* 59). For example, *ARU* 24 reads:

> A has received *x* talents of tin as a loan from B. He will repay the capital, the tin, within seven months. If the due date passes, the tin will bear interest. . . . His field, sons, and house are security for the tin. He will pay the tin to the bearer of his tablet.

Other such contracts contain a further clause explicitly stating the fate of the pledge should the debtor fail to repay the loan by the due date. They are classified by Koschaker[14] into two types, depending on the consequences stipulated. In the first, termed *Verfallspfand*, ownership in the pledge passes automatically to the creditor. Thus, in *ARU* 55 we read:

> A and B have borrowed *x* homer of barley from C. [They will repay the capital, the barley, within *y* months]. If [the due date] passes, they will repay [. . .] *z* mina of tin. C will hold their field, house, threshing-floors, wells, sons, or daughters as pledge. If the due date passes, their pledges are acquired. There is no withdrawal or claim. A and B have received the tin, the purchase-price of their pledges: they are paid, quit. They will clear their pledges of claims, measure with the royal line, and write a "firm" tablet before the king.

Forfeiture of the pledge is expressed here in terms of sale, with typical sale clauses including a payment clause, although the only express payment that the document records is the sum of the original loan. It looks very much then as if the creditor has obtained what the law of redemption was supposed to prevent: the outright purchase of land or persons for the mere price of the loan for which it was security. That the law was not so, however, is shown by a further tablet that was drawn up at the stage of forfeiture itself.[15] The text relates that a specified area of land was pledged as security for the relatively small sum of 30 mina of tin, the due date passed, and the field was duly alienated to the creditor. But it continues: "He [debtor] claimed the price of his field, and he received the balance of his tin: he received 100 mina apart from the contents of his tablet."

In other words, the creditor did indeed "purchase" the pledged land by way of forfeiture, but he still had to pay the full price for it, by giving the debtor the difference between the value of the loan and that of the field.

An express statement of this rule is found in the contemporary Middle Assyrian Laws. Paragraph C+G 7 reads:

> [If a slave(?) an ox(?)][16] or anything taken as a pledge is dwelling in the house of an Assyrian, and the due date passes, [after it has p]assed, if the loan amounts to as much as his price, he is acquired and taken; if the loan does not am[ount] to as much as his price, [the creditor] may acquire and take him but may not reduce [the price(?)]—he shall ded[uct] the capital of the loan. . . .

In other words, the creditor must pay the debtor the difference between the loan and the pledge's full value if he is to gain full ownership of the pledge, unless the loan and the pledge are already equal in value.

The second type of contract is called by Koschaker *Lösungspfand*. *ARU* 46 is an example thereof:

> A has borrowed *x* mina of tin and *y* homer of barley . . . from B. He shall repay the capital, the tin, and the barley, within 6 months. If the due date passes, the tin will bear interest. If he does not repay the barley, he shall pay tin for barley at the going rate. If he does not pay tin, the tin will bear interest.
>
> B will take and hold A's slave C and a house of his in his town as pledge. On the day that he repays the tin and its interest, he redeems his pledges.

Here then we have a clause allowing the debtor to redeem his pledge even after the due date on payment of the loan capital plus interest. It is not clear that this clause was inserted entirely for the benefit of the debtor. Possibly the creditor did not wish to make the extra capital expenditure in order to acquire the pledge in perpetuity. While the creditor could not claim full ownership of the pledge, therefore, the debtor equally could not claim the balance of its value from him. And while awaiting redemption, the creditor still had a profitable investment. This consideration is illustrated by ARU 38, a *Lösungspfand* where the debtor does not have to pay interest but at the same time must wait six years to redeem the land pledged.

To summarize, in both types of pledge, contract ownership in the pledge passes to the creditor on expiration of the term for repayment. The difference is that in *Lösungspfand* the pledge is acquired at the price of the loan and therefore remains redeemable, while *Verfallspfand* contains a mechanism for acquisition of the land in perpetuity by paying its full value. In our submission it is this mechanism, this grafting of outright sale on to pledge, that forms the background to VI 1 in the Twelve Tables and resolves the paradox of two incompatible transactions, pledge and sale, being lumped

together in the protasis. The situation contemplated is where the creditor is prepared to turn *nexum* into *mancipium* either by giving a loan equal in value to the pledge[17] or by paying the difference if the pledge is not redeemed by the due date.

The meaning of the apodosis of VI 1, that is, the purpose of the law, is more difficult to ascertain, since the ancient Near Eastern sources provide us with a context but no direct parallel. Our remarks on this point, therefore, are bound to be more speculative and are offered with due reserve.

To begin on relatively sure ground, we know that the active party in the ceremony of *mancipatio* was the buyer, who made a formal declaration of acquisition. It is therefore reasonable to suppose that the subject of the verb *faciet* and of the declaration is the creditor/buyer, and from this to conclude that the law is regulating his actions in some way, possibly defining his rights by reference to the terms of his declaration. The most plausible form that this would take, it seems to us, would be a regulation preventing the creditor from claiming the right to buy the pledge definitively (on payment of the balance) where the debtor has defaulted, unless the transaction had expressly been declared a *Verfallspfand* at the outset.

Our second example from the Twelve Tables is IV 2: *si pater filium ter venum duit*, *filius a patre liber esto*. Here again, a literal translation produces an apparently inescapable contradiction. "If a father sells a son three times, the son is free of the father." How could the father, having sold his son, get him back not once but twice in order to be able to resell him?

Watson suggests that pledge, in the form of *nexum*, is behind the transaction, and the son could thus return to his father's *potestas* in spite of having been sold by *mancipatio*.[18] He does not explain, however, how pledge can be identified with sale or why the transaction was not simply called *nexum*. Yaron assumes the existence of a regulation by law or legal custom, whereby the *mancipium* relationship is limited in time, and mentions ancient Near Eastern parallels.[19] Kelly argues that *venum duit* does not refer to *mancipatio*, but to sale in a limited sense of to lease, but can cite only a weak parallel from a non-legal source.[20]

Instead of choosing between these conflicting suggestions we wish to combine the leading elements in them: that the background to the transaction was the satisfaction of debts, that the sale in question is of the same nature as the slave-sales regulated in ancient Near Eastern laws, but that it is not *mancipatio*. If we place this composite hypothesis in the context of our foregoing discussion, a coherent picture emerges.

In the ancient Near East when a man sold members of his family into slavery, it was not a commercial transaction for the full value but a necessity

brought about by debt, and the right of redemption could therefore be invoked. For example, Codex Hammurabi 119 reads:

> If a man is seized by a debt and gives his slave-woman who has borne him sons for sale,[21] the owner of the slave-woman may pay the silver that the merchant paid and redeem his slave-woman.

The point here is that the slave-woman is regarded as a member of the family in these circumstances and her sale deemed non-commercial.

But some legal systems, at least, went further. According to Exod. 21:2:

> If you buy a Hebrew slave, he shall work six years and in the seventh go free for nothing (i.e., without repaying the debt).

Similarly in Codex Hammurabi 117:

> If a man is seized by a debt and gives his wife, son, and daughter for sale[22] or in *kiššātum*, they shall serve the household of their buyer or holder in *kiššātum* for three years; in the fourth year their emancipation shall be established.

The term *kiššātum* is still unclear but appears to refer to some sort of pledge with a right of redemption limited in time.[23] It is important to note that it is in parallel with straightforward sale; both are equally affected by the emancipation rule. Clearly, for persons in such straits as to be forced to sell their own family, even redemption might remain a hollow right and more radical measures were needed.[24]

The situation in IV 2 is, we submit, that a father has likewise had to sell his son into slavery under pressure of debt. The unusual terminology—*venum duit*—is used advisedly; the sale was not at full value and therefore in this early period was not *mancipatio*, in spite of the nature of its object. Accordingly, the right of redemption still existed, but possibly also, as Yaron surmised, a rule effecting automatic emancipation (and cancellation of the debt) after a fixed period. We know from the ancient Near Eastern sources that even such drastic measures were sometimes ineffective: in Jeremiah 34:8–11 it is related that king Zedekiah decreed a general release of slaves,[25] but that subsequently the same persons were re-enslaved for debt. Emancipation had brought only temporary relief. The same is true, it would appear, of the father in IV 2, from the very circumstances of his having to resell his son. It is therefore more likely that the son had returned to him by automatic emancipation than by redemption. Where such a sale recurs three times, it is obvious that the family must be totally impoverished. There is therefore little point in the son remaining in his father's *potestas*. He has no prospect

of an inheritance, only of being exploited by his father's creditors. A rule releasing him from *potestas* will at least ensure that his emancipation will not again be nullified by his father's chronic indebtedness.

Notes

1. On the reception of ancient Near Eastern law into early Roman law, see Yaron 1974; and Westbrook 1988a. The particular connection predicated here was the subject of a paper given by the author to the annual conference of the Société Internationale de l'Histoire des Droits de l'Antiquité (SIHDA) in Stockholm in September 1986.

2. For a detailed account of these rules, see Westbrook 1985b.

3. For land and slaves, see below. Temple prebends were treated like land for the purposes of sale and inheritance, and at least one redemption-purchase of a prebend is recorded (*BE* 6/2 66).

4. Sale documents in the same formulation as those for land, slaves, and prebends are occasionally also found for oxen, cows, and boats. In our view these documents record a ceremony designed to overcome rules restricting transfer of ownership. See Westbrook 1985b: 119–124.

5. The female equivalent of inheritance, the dowry, consists mostly of inanimate moveables, albeit sometimes of considerable worth. Land, slaves, etc., are a rarity confined to the rich.

6. See Westbrook 1985b: 109–111.

7. Westbrook 1985b: 109–111.

8. See below and cf. Deut. 15:18: "It shall not seem hard to you to free him [the slave], for he has worked double the hire of a hired man for you for six years."

9. See Eichler 1973: 37–46.

10. Watson 1975b: 144.

11. The classical explanation, that the clause authorizes the insertion of subordinate clauses in the *mancipatio* (see Buckland and Stein 1966: 237), is more jurisprudential than historical. It gives the term *nexum* a general meaning more suitable to classical law (following Manilius: Varro *L.* 7.105).

12. Cf. Watson 1975b: 118–119.

13. *ARU = Assyrische Rechtsurkunden*, published by David and Ebeling 1929.

14. Koschaker 1928: 102–108.

15. *KAJ* 150, edited and discussed by Koschaker (1928: 103) and by Westbrook (1985b: 117).

16. Restorations proposed on the basis of context. Cf. Cardascia 1969: 307.

17. In the extant sources *nexum* is a pledge of persons, but there is no intrinsic reason why it could not have applied to other pledgeable items such as land or animals.

18. Watson 1975b: 118–119.

19. Yaron 1968: esp. 71 n. 34.

20. Kelly 1974: 183–186, citing Cato, *De Agr.* 149.

21. The Akkadian phrase is literally "to give for silver" (*ana kaspim nadānum*), a standard expression for sale.

22. The phrase is the same as in CH 119 (see previous note), but the verb "to give" has a double predicate "for silver" and "for *kiššātum*."

23. See the discussion by Kraus 1984: 266–277.

24. A further measure was a general, retrospective cancellation of debts. This was typically proclaimed by a king on his accession to the throne or in a national emergency. For a Babylonian example see *ANET* 526–528, and the literature cited therein.

25. See previous note.

The Coherence of the Lex Aquilia

Abstract

A long-standing crux among legal historians has been the thematic relationship between Chapters I, II, and III of the Lex Aquilia. By analyzing the Lex Aquilia against the background of ancient Near Eastern law codes, this article argues that its chapters follow a standard organizational technique found in these codes. Further, the chapters are structured around a single theme: points in time upon which assessments of damages can be based. It was only later that the Lex Aquilia took on the aura of fundamental law on liability for wrongful damage.

Introduction

When in 1816 Niebuhr's discovery of the Gaius palimpsest also brought to light the missing second chapter of the Lex Aquilia, the newly revealed text should have laid to rest centuries of speculation and argument.[1] It did not. For, contrary to all expectations, the second chapter as summarized by Gaius did not form a bridge between the killing of Chapter I and the wounding of Chapter III; it dealt with a totally unrelated topic, the fraudulent *adstipulator*.[2]

Speculation as to the relationship between the three parts of this law has therefore continued. According to Daube, their order is the result of an historical accident.[3] The law originally consisted of the first two chapters only, on different topics. When the third was added to supplement the first, the text of the existing law was already too familiar and too fixed, in inscription or in people's minds, for the new chapter to be inserted between its

[Originally published in *Revue Internationale des Droits de l'Antiquité* 42 (1995): 437–471. Reprinted with permission, which we gratefully acknowledge.—Eds.]

members, and it was therefore tacked on the end. Daube cannot adduce examples of this process, although he applies his reasoning elsewhere, to explain the apparently curious order of the laws in a number of biblical passages.[4]

In fact, there exists one example not mentioned by Daube which would seem to support the feasibility of his hypothesis. In the Great Code of Gortyn, the provisions are organized by topic, but at the end there are two sets of supplementary provisions, the first being independent and the second relating to various rules already formulated in the main body of the text.[5] The reason for this order would appear obvious: the Code being inscribed on a stone wall, it was not physically possible to insert later provisions in their logical place among the earlier ones. The supplementary provisions, however, are separated from their earlier counterparts by a great deal of text; the third chapter of the Lex Aquilia by but a single short provision. A change of order would not therefore meet any comparable practical obstacle. Daube surmises that the first two paragraphs constituted only a small fraction of the earlier statute from which they were taken to form the present version through the addition of a third.[6] In those circumstances, however, the problem of rearranging an existing text carved on stone no longer applies.

The underlying difficulty with Daube's thesis is that, while it seeks to provide a plausible explanation for the separation of Chapters I and III, it fails to account in any way for the connection between Chapters I and II. Daube can only suggest the model of a *lex satura*,[7] a statute comprising miscellaneous reforms—which begs the question why these two provisions, unrelated in substance, should have been thrown together, and in such intimacy that they could not then be parted by a provision with a better claim.

The difficulty is equally acute in Pringsheim's proposal, which claims to see in our textual witnesses the traces of a highly systematic process of historical evolution.[8] Pringsheim suggested that the law passed through no less than six stages of amendments by successive legislators. Chapter I was first followed by a new statute, Chapter II, and then by four other enactments, which were ultimately combined to form Chapter III: (i) wounding slaves and four-footed *pecudes*, (ii) killing and wounding four-footed animals who are not *pecudes*, (iii) killing and wounding other animals, (iv) damage to inanimate objects. While many objections could be made to his treatment of Chapter III, such as its failure to distinguish between legislation and juristic interpretation, at least it may be said that the stages represented by Chapters I and III follow a logical pattern of expansion. Not so the insertion of Chapter II as stage two, which as Pringsheim admitted is "rather odd."[9] His explanation, that it is easier to understand on the assumption that there

were six independent enactments, of which it formed one, effectively undermines his own logic, since it abandons the idea of rational expansion on which his division of Chapter III into chronological steps depends.

In this regard Pugsley is more consistent. He takes the model of the *lex satura* to extremes, denying a connection between any of the three chapters.[10] Again, we are not concerned with his interpretation of Chapter III (although it does depend on an approach that we regard as methodologically unacceptable, namely, emendation of the text on the basis of the author's theory rather than of independent criteria). Our objection is to the assumption, common to all these three authors, that because the organization of the Lex Aquilia is not immediately apparent, it did not exist. Given the amount of effort that has been expended by modern scholars to arrange the fragments of the XII Tables in a rational order, it is remarkable how readily the opposite has been assumed for the Lex Aquilia, whose order is known to us and was regarded as fixed by the Roman jurists themselves.

The Text

It is of course impossible to reconstruct the original text itself from our present sources, not least because the language in them has undergone a process of modernization.[11] The best we can hope to attain is its most faithful representation in the extant sources, by relying on the most direct textual witnesses.[12]

Chapter I presents the least difficulty, since it is reproduced in similar versions in Gaius' *Institutes* and in the Digest, where Gaius is purported to quote the text directly:

> *Dig.* 9.2.2 pr. (*Gaius ad edictum provinciale*): <*si quis*>[a] *servum servamve alienum alienamve quadrupedem vel pecudem iniuria occiderit*, *quanti id in eo anno plurimi fuit*, *tantum aes dare domino damnas esto*. ("If anyone kills unlawfully a slave or female slave belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceding year.")
>
> [a]Gaius *Inst*. III 210: "*ut qui*."

For Chapter II we have only a paraphrase by Gaius, which will have to serve as our text:

> Gaius *Inst*. III 215: *Capite secundo <adversus> adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit*, *quanti ea res est*, *tanti actio*

constituitur. ("The second section of the Act provides an action against an additional stipulator who grants a verbal release of a debt in fraud of the stipulator, and it gives an action for the value in money of what is involved." [Trans. Gordon and Robinson])

Chapter III exists in several conflicting versions, but only *Dig*. 9.2.27.5 purports to be a direct quotation by Ulpian of the whole text:[13]

si quis alteri damnum faxit quod usserit fregerit ruperit iniuria, *quanti ea res erit in diebus triginta proximis*, *tantum aes domino dare damnas esto*. ("If anyone damages the property of another, whatever the value of the property burned, broken to pieces, or injured, was, within the next thirty days, the party must be compelled to pay the amount to the owner of the same.")

Following Lenel, we have omitted the opening clause.[14] The phrase *praeter hominem et pecudem occisos* ("except by killing slaves or cattle") has long been regarded as suspect, not least because it is ungrammatical.[15]

Lenel rejected *ceterarum rerum* on the grounds that "other things" could not refer to Chapter II, since it concerned a debt, not a thing. Honoré, however, regards these words as genuine, referring not to things other than slaves and animals but to "matters other than those comprised under the first two chapters of the statute."[16] In the absence of a substantive link between Chapter I and Chapter II, however, the phrase is meaningless. Any provision would be bound to deal with "other matters" than the first two chapters because they deal with entirely different matters themselves. It only makes sense on the assumption either that Chapter II has been omitted, which was of course the situation in Justinian's day, or at least is to be disregarded, which seems to have been the attitude of Gaius.[17]

The special feature of this version is the verb *erit*; G. III 218 has *fuerit* and *Dig*. 9.2.29.8 (Ulpian) has *fuit*. Although the latter two represent the classical jurists' understanding that damages were to be assessed by reference to the preceding thirty days, the form *erit* is still to be preferred, without reference to the content of the clause,[18] because it is both a direct quotation and the *lectio difficilior*. It would have been unthinkable to a jurist in Ulpian's day or subsequently that the third chapter could refer to a future period of time. At the same time, the discussion among classical jurists of Sabinus' proposal to imply the term "highest" in the third chapter and their attempt to justify it by an historical fiction reveals a certain disquiet which may point to an innovative interpretation, changing the direction of the clause, as Daube surmised.[19]

Nonetheless, Ankum argues that the word *erit* is no more than a scribal error in the manuscript that now constitutes our primary witness.[20] His grounds are threefold. Firstly, he points out that while the passage in Gaius' *Institutes* is admittedly a paraphrase, *Dig.* 9.2.29.8, containing *fuit*, purports to be a direct quotation of Ulpian no less than in the passage under discussion.[21] They are not *pari passu*, however. Our passage cites the whole law; 29.8 only the offensive clause—in the context of Sabinus' tendentious interpretation! It should be added for good measure that the exact same limitations, i.e., discussion of the one clause and acceptance of Sabinus' interpretation, characterize Gaius' paraphrase in III 218.

Secondly, Ankum argues that it is *fuit* or *fuerit* that should be regarded as the *lectio difficilior*, since the phrase *quanti ea res erit* is far more common in the Digest and the scribe was therefore likely to write *erit* in error instead of *fuit*, rather than the other way round.[22] The term *lectio difficilior* used in this way is a misnomer. Properly speaking, it indicates a writing against the accepted meaning of the passage, which *erit* clearly is (and was at all material times: of the Florentine manuscript and of Justinian's and Ulpian's compilations) and *fuit* and *fuerit* are not. Ankum's argument amounts to no more than a possible rationale for scribal error. That possibility is not strong enough to overcome the stringencies of the *lectio difficilior*: the phrase *quanti ea res erit* is frequent but not universal, and its use is therefore not inevitable. It does explain, however, how the interpretation of "last thirty days" could have prevailed among the classical jurists in spite of the express wording of the *lex*. It was possible to relate *erit* to the idea of what the facts at the coming trial would prove to be (as regards the highest value in the thirty days preceding the damage), which is the meaning the phrase *quanti ea res erit* has in the *condemnatio* of a classical formulary action,[23] but which is irrelevant to the question of the point in time to which the value should be imputed.[24] The use of such reasoning would account for Gaius' choice of *fuerit* in his paraphrase, namely, "the highest it shall turn out to have been in the preceding thirty days."[25]

Ankum's final argument is that the sixth-century Greek translation of *Dig.* 9.2.27.5 in the *Basilica* has the verb in the past tense (ἦν) and the translator therefore had the word *fuit* before him. It should be remembered, however, that the *lectio difficilior* is no less valid an approach to translations than to original transcriptions. As with ancient copyists, there was a tendency for ancient translators to harmonize "difficult" words or phrases in the original with the accepted interpretation of the passage in their day.[26] For a Byzantine translator of this text, to use the future tense would be to mistranslate, since the resulting law would have made no sense to him.

The Structure of the Lex

A formal analysis of the text thus established gives rise to two simple observations. Firstly, it presents two casuistic laws, beginning *si quis*. It does not necessarily follow, but it is reasonable to suppose that the middle law originally had a similar form, at least casuistic, if perhaps beginning *si adstipulator*, rather than *si quis*.[27]

Secondly, there is one feature that all three laws have in common, namely, a clause beginning *quanti*. In the successive clauses, however, the tense of the respective verbs follows a strict chronological order: *quanti id fuit*, *quanti ea res est*, *quanti ea res erit*.

In our view, that sequence is the key to understanding the structure of the Lex Aquilia. The connection between the three laws lies not in their protasis, in the circumstances to which they apply. It lies in the apodosis. The purpose of the apodosis in all three laws is to establish not liability for the wrongs described in the protasis but the point in time upon which assessment of damages is to be based. In the first and third laws, the element of time (and the rationale for the tense of the verb) is clear. Express reference is made to a point in time preceding commission of the wrong (up to a year) and to one following it (thirty days).

In the second law, the element of time is not so evident, since the time of the offense would naturally be the moment at which to assess damages in most laws. It could be of significance only if there were something in the circumstances of the protasis that could give rise to a claim that the time of the offense was *not* appropriate. Given the emphasis on time in the two surrounding laws, it is reasonable to suppose that there was such a claim, and circumstances can be posited to which it would apply. (It should be stressed that we have insufficient information about the nature of the fraud and the loss occasioned by it to establish more than the feasibility of a time-conditioned assessment.) *Adstipulatio* was used to ensure the performance of a promise in the absence, or after the death, of the principal stipulator.[28] Gaius informs us that *acceptilatio* was a sort of imaginary payment (III 169), which means that it could be used for remission of obligations not performed. Thus if *acceptilatio* of an obligation were made by the *adstipulator* before its due date, for example, the question might arise whether damages should be assessed as of the time of the *acceptilatio* or as of the due date.[29]

To summarize so far: the Lex Aquilia has a logical structure. Three examples are given of different circumstances which give rise to a different point in time for assessment of damages: prior to the wrong, at the same time as the wrong, and subsequent to the wrong.

The Background to the Lex

To a scholar trained in classical Roman law, the appearance of these three clauses in chronological sequence would seem to be nothing more than coincidence. When placed against the background of ancient Near Eastern law codes, however, it can be seen in an entirely different light.

The nine extant law codes from the ancient Near East, seven preserved in cuneiform script and two found in the Hebrew Bible, show, in both form and content, the marks of a common intellectual tradition.[30] As to form, they all consist of endless lists of individual cases, formulated casuistically, for the most part after the pattern: "if a man does x, the legal consequence is y."

When first deciphered, the codes were regarded as little more than random concatenations of such cases, a *satura legum*, but more recent research has shown them to be endowed with a tight organizational structure, in which various techniques are used to draw several disparate examples together so as to mark the parameters of a given theme. Rhetorical devices include chiasm, progression, and what may be called "extreme opposites."[31]

A particularly popular form of progression is the chronological sequence. Thus Codex Eshnunna 25–35 discusses the theme of marriage by culling examples from its various stages: betrothal, marriage, and children,[32] while contractual provisions in Codex Hammurabi 241–272 follow the rhythm of agricultural work, from planting to harvest.[33] In a sequence in Deut. 20:1–21:9 on the theme of war, four laws deal successively with the mustering of the army, declaring war, conduct of a siege, and banditry after the supposed cessation of hostilities.[34] An example brief enough to be cited in full is furnished by Codex Hammurabi 1–5:

> 1: If a man accuses a man of murder and does not prove it, his accuser shall be killed.
> 2: If a man accuses a man of witchcraft and does not prove it, the one accused of witchcraft shall go to the river and "leap the river." If it overcomes him, his accuser shall take his house; if the river clears the man of guilt, the one who accused him of witchcraft shall be killed. The one who "leapt the river" shall take his accuser's house.
> 3: If a man comes forward to give false testimony in a lawsuit and does not prove what he said, if it is a capital case that man shall be killed.
> 4: If he comes forward with evidence concerning barley or silver, he shall bear the penalty of that case.
> 5: If a judge gives a judgment, renders a decision, and has a sealed document drafted but afterwards changes his judgment: they shall prove that the judge

changed the judgment he gave, and he shall pay 12-fold whatever claim is in that case and be expelled from his judge's seat in the assembly. He shall not sit again with the judges in a lawsuit.

The unit discusses the topic of litigation by choosing examples from the three chronological stages of a lawsuit: accusation, testimony, and judgment.

In the sequences discussed so far, the theme linking the individual rules is found in the circumstances to which they apply. The common factor of a group of laws need not, however, be confined to the facts in their protasis. In Exod. 21:12–17 we find the following four laws:

12–14: He who strikes a man so that he dies shall be put to death. As for him who did not lie in wait, but God forced his hand, I shall establish for you a place to which he may flee. But if a man plots against his neighbor to kill him with cunning, you shall take him from my altar to die.
15: He who strikes his father or mother shall be put to death.
16: He who steals a man and sells him or in whose hands he is found shall be put to death.
17: He who curses his father or mother shall be put to death.

The only link between these laws is in their legal consequence: they are all cases involving the death penalty.

The tradition exemplified by these scattered examples that we have considered so far was not confined to the Near Eastern codes but appears to have cast its shadow further westward. The Great Code of Gortyn was referred to above as a possible model for Daube's theory of subsequent additions. It also may serve as a model for our thesis, since it not only shares the basic casuistic form of the Near Eastern codes but also shows signs of similar structural patterns.[35] Thus we find the chronological sequence:

Seduction (II 16–20)
Adultery (II 20–45)
Divorce (II 45–III 16)
Widowhood (III 17–37)
Children (III 44–IV 23).

It is interesting to compare a sequence from the Laws of Eshnunna that we have already mentioned:

Seduction/rape of betrothed (§§25–26)
Adultery (§§27–28)
Desertion (§§29–30)
Children (§§32–35).

In both cases, it should be noted that there is a gap in the paragraphs that constitute the sequence. The reason is the same: the chronological sequence is broken by another familiar sequence: that of free/slave (III 37–44 and §31, respectively).[36]

At Rome, the only law of greater antiquity than the Lex Aquilia is (by conventional dating) the Twelve Tables. For the most part, the order in which the individual provisions of the Twelve Tables are arranged in modern editions exists only for the purposes of convenience; it has no claim to historical authenticity. One sequence that could be regarded as authentic is that of the provisions on personal injury now found in VIII 2–4. Although the text given by Gaius in III 223 is not a direct quotation, its accuracy is confirmed by direct quotations of its individual laws by other authors.[37] If the order given by Gaius is correct, then, it follows a familiar pattern in the Near Eastern codes, namely, a list of injuries by body part in the protasis and a (generally) declining severity of penalty in the apodosis, with intervening sub-sequences of free man, slave, as victim.[38]

We have argued elsewhere (on grounds of form and substance, but not of structure) that the Twelve Tables belong to the same scholastic legal tradition as that of the ancient Near Eastern codes.[39] The evidence for the Lex Aquilia also belonging to this tradition seems to us as strong if not stronger. Three laws in casuistic form are organized in a pattern that is not identical to any particular law from the ancient Near Eastern codes, but matches exactly the type of structures in which the latter are organized. Structure is all the more significant because it is purely a product of intellectual effort; it cannot be dismissed as the coincidental recurrence of an everyday legal problem, as is sometimes claimed with regard to similarities of content between laws in different codes.[40]

The Nature of the Lex

The interpretation here proposed for the Lex Aquilia faces an immediate objection in respect of function. It is difficult to believe that a legislative reform, even a technical reform of the assessment of damages, would have been structured in this way. The assembly of three different cases as examples of different means of assessment and their arrangement in a chronological order is more appropriate to an academic discussion than to a statutory enactment.

The reason, in our view, is precisely that: the text of the Lex Aquilia was in origin an academic document. To return to the law codes of the ancient Near East, a series of studies in recent years has shown that they were not,

as first assumed, legislation of any sort, but scholarly treatises on the law that were purely descriptive in character. They belong to a wider tradition of Mesopotamian science whereby intellectual inquiry was pursued by the compilation of lists—lists of legal cases and their resolution, of omens and their meaning, of medical symptoms and their prognosis, of words and grammatical forms.[41]

The casuistic formulation is both characteristic of this genre of literature and marks its limitations. Lacking all-embracing categories, definitions, or any of the analytic tools at our command, Mesopotamian science could only compile endless lists of examples and relied on structure, on its organization of those examples, to give some analytical shape to the discussion. As Eichler concludes with regard to the organization of the paragraphs of Codex Eshnunna, "This structure would rather seem to add further support for placing the Eshnunna law compilation within the orbit of Mesopotamian tradition. The features of the structure suggest a legal textbook, featuring a 'socratic' methodology, designed for the teaching of Mesopotamian legal thought and the appreciation of the complexities of legal situations."[42]

The Lex Aquilia, if it derives from this background, would have begun life as part of a body of learning, a scholastic document or oral tradition. Its classification as a *lex* is a reflection of subsequent events which removed it from its original context and gave it a new role as the basis of the law of wrongful damage. To understand the process involved, we may refer again to the Near Eastern sources, and to the one ancient legal system that continued in use in Hellenistic times.

The Bible, as we have noted, contains two law codes which are based on the tradition of Mesopotamian science, having strong connections in content with earlier cuneiform codes and being cast in its characteristic "scientific" style, the casuistic formulation. They were, therefore, originally independent sources or oral traditions but were incorporated into a historical narrative that attributed their origin to an act of divine legislation in the Sinai desert prior to settlement of the Israelites in the promised land. The process of incorporation is a complex and much disputed problem but must have been complete by the fourth century B.C.E., before the closing of the biblical canon.

The Mishnah is a compilation, committed to writing in the early third century A.D., of the jurisprudence of the Tannaim, Rabbinical jurists who were active from the mid-first century B.C.E. The Mishnah regards the biblical laws as still valid, indeed as holy writ, but its use of them completely transforms their meaning. Casuistic laws applying to very narrow cases are

reinterpreted as broad basic statements of the law which they touch upon. From then on the old laws are interpreted as if they were recent, general legislation, often in complete contradiction with their earlier meaning or with an entirely new emphasis. For example, Deut. 24:1–4 presents a complicated case of divorce and remarriage:

> 1: If a man marries a woman and it happens that she finds no favor in his eyes because he found something of unseemliness in her and he writes her a bill of divorce and gives it into her hand and sends her from his house,
> 2: and she goes forth from his house and goes and becomes the wife of another,
> 3: and the latter hates her and writes her a bill of divorce and gives it into her hand and sends her from his house, or the latter husband who marries her dies:
> 4: her first husband cannot take her again as his wife, after she has been made unclean to him. . . .

The purpose of the law is to prevent remarriage by the original husband when there has been an intervening marriage by the wife. The rationale of this prohibition and the exact circumstances to which it applied have been much debated.[43] It is clear, however, that the question of divorce is subsidiary to the main point of the law: the divorce procedure is mentioned in passing, in the recital of circumstances in the protasis; it is not regulated in the apodosis. In the Mishnah and later jurisprudence, on the other hand, this text is taken to be the basic law on divorce as such. Its opening clause, "If a man marries a woman and it happens that she finds no favor in his eyes because he found something of unseemliness in her" is interpreted by the Tannaitic jurists as follows (*Giṭṭin* 9.11):

> The School of Shammai say, A man may not divorce his wife unless he has found in her something improper, as it is said, *because he found something of unseemliness in her*. But the School of Hillel say, Even if she spoiled a dish for him, as it is said, *because he found something of unseemliness in her* (i.e., understanding the phrase to mean "unseemliness or something else"). Rabbi Akiba says, Even if he found another more beautiful than she, as it is said, *And it happens that she finds no favor in his eyes*.

The background to this transformation is an intellectual revolution in which ancient Israel was caught up when it became part of the Hellenistic world: the replacement of Mesopotamian scientific thought by Greek philosophy.[44] The ability that the latter gave to define terms and create universal categories allowed jurists to create a new legal system, but not *ex nihilo*—

rather by placing existing legal material in an entirely different intellectual framework, so as to change in effect its substantive meaning.

The same process was, we suggest, at work at Rome during the late Republic, where the influence of Greek thought is too well known to require demonstration.[45] In the case of the Lex Aquilia, this meant that a very specialized rule on the assessment of compensation was elevated to the status of a basic statement on the law of wrongful damage.

The Origins of the Lex

The assumption that the Lex Aquilia was a legislative reform raises the question, what was the object of the reform? Two answers have been proposed.

The first is associated with the date found most frequently in textbooks (albeit with varying degrees of skepticism) for promulgation of the *lex*, namely, 287/6 B.C.E.[46] According to Beinart, the law was passed by the *plebs* after their third secession in order to exact reparations from the patricians.[47] Beinart surmises that the secession was attended by disorders, during which plebeians suffered undue attacks on their property at the hands of the patricians. Since it was difficult to prove who had been the author of particular attacks, the retrospective provisions of the law (if one assumes both Chapters I and III to be retrospective) served as a sort of collective fine for any previous damage inflicted by the defendant's brothers-in-arms.

Beinart's theory has not found acceptance, for two reasons. Firstly, as von Lübtow points out, there is nothing in the law's provisions of a political character or of substantive connection with secession of the *plebs*.[48] Nor, we would add, is there anything to suggest that the law had any bearing whatsoever on the struggle between the orders.[49]

Secondly, the sources that suggest a connection, namely, the assertions of certain Byzantine jurists, are not to be relied upon.[50] They have been dismissed as historical fantasies, concocted from scraps of information such as Ulpian's remark (*Dig.* 9.2.1.1) that the Lex Aquilia was a plebiscite and Pomponius' account (*Dig.* 1.2.2.8)[51] of how plebiscites became binding on the whole people by the Lex Hortensia after a secession of the *plebs*.[52] We would add that Cicero at the end of the Republic seems to know nothing of a tradition linking the Lex Aquilia with civil strife and general destruction; on the contrary, he contrasts its provisions, suited to ancient times when killing was a rarity, with provisions enacted in his own day against the background of civil war to give a remedy against armed hands, for which the Lex Aquilia was inadequate.[53] It is unlikely therefore that the Lex Aquilia was a measure of political reform.

The second object proposed for the Lex Aquilia's reforming zeal is to protect the interests not of disaffected plebeians but of wealthy creditors. According to Honoré, the main point of the legislation was to substitute for the fixed penalties of the earlier law an assessment of damages based on the value of the thing killed or the actual loss suffered through burning, breaking, or tearing another's property.[54] Fixed penalties such as those in the Twelve Tables of 150 *asses* for breaking a slave's bone and 25 *asses* for cutting down a tree ceased to be of use to property owners when inflation destroyed their value. Honoré accordingly attributes the passing of the Lex Aquilia to the period of high inflation at the end of second Punic war.

The difficulty with Honoré's proposal is that the provisions of the Lex Aquilia are singularly ill-suited to the purpose of compensating for the effects of inflation. It is pointless to look back to the previous year for the highest value of a slave when inflation ensures that his value will always be highest at the latest possible date.[55] Even the next thirty days provision of Chapter III will be of little help: the only fair measure in a time of high inflation is value at the time of judgment. Ironically, Chapter II appears the most suited to the task attributed by Honoré to the *lex*, but only perhaps because of our uncertainty as to the details of that provision.

Birks suggests that Chapter II was indeed promulgated to deal with the effects of inflation, albeit of a different kind. It was designed to prevent corrupt bargains between debtor and *adstipulator* to accept repayment of a loan made in *asses* in silver coins of a higher denomination, such as *denarii*, at less than the going commercial rate of exchange between the silver and bronze coins. This could only have occurred during the inflationary conditions of the Punic wars, when the exchange rate was "floating," i.e., a matter for free bargaining. Thereafter, return to currency stability made the law obsolete.[56]

Stipulatio, however, was an obligation *stricti iuris*, with all the rigor in favor of the creditor thereby implied. Even assuming that a situation existed wherein the exchange rate was a matter for bargaining between creditor and debtor *at the time of repayment*[57] and further that the *adstipulator* had a discretion to bargain with the debtor over repayment in terms that did not amount to *datio in solutum*,[58] then it is still not clear why legislation would have been necessary to remedy a wrong that any intelligent creditor could have avoided by formulating his *stipulatio* more tightly, so as to bar payment in unfavorable coinage.

To return to Chapters I and III, it is true that, even without the factor of inflation, the Aquilian measure of damages appears to be more sophisticated than that of the Twelve Tables, and certainly by Ulpian's day it had superseded the latter in areas where they were deemed to overlap.[59] It would

be rash to assume however, as for example Daube does,[60] that the one was necessarily a reform of the other. The relationship between the two laws can be put in perspective by recourse once more to sources from the ancient Near East.

The example that served Daube as a model for the idea of emerging damage in Chapter III is the case in Exod. 21:18–19, where a man injured in a fight is paid compensation, after his recovery, for his medical expenses and loss of work. That case is a standard scholarly legal problem that recurs in other ancient Near Eastern law codes, namely paragraph 206 of Codex Hammurabi and paragraph 10 of the Hittite Laws.[61] Those same law codes, however, contain another legal problem on wounding, which takes the standard form of a list of injuries with either talionic punishment or a tariff of fixed payments according to the part affected: eye destroyed, bone broken, face slapped, etc. We have argued elsewhere that the fixed payments are not by way of compensation, but just as *talio* represents a limit on permissible revenge, so fixed payments set a limit on the ransom payable in lieu of revenge.[62]

Thus two measures of damage coexist in the same law code.[63] The reason, we suggest, is that they are concerned with separate offenses. The one deals with injury where there is a low level of culpability or damages or some mitigating circumstance, and the other with assaults that represent an affront to the victim's dignity, as the case of the slap in the face graphically illustrates.[64] The one therefore emphasizes indemnification as the measure of damages, while the other emphasizes revenge, as exemplified by *talio*. In our view it is no accident that the same dichotomy (expressed by the terms *contumelia* and *culpa*) is found in the developed actions of *iniuria* and *damnum iniuria datum*; it represents the original scope of apparently overlapping provisions of the Twelve Tables and the Lex Aquilia, with *talio* and fixed payments on the one hand, and indemnification on the other.

To summarize: the view that the Lex Aquilia was a legislative reform is unsupported by evidence linking it to any historical object of reform. In particular, there is no basis for supposing that it embodied a political reform such as might be implied by the use of a plebiscite.

The evidence for the latter proposition is, as we have seen, a statement attributed to Ulpian in the Digest. Ulpian's statement is of an antiquarian character. On the one hand, it may reflect a long-standing tradition. On the other, it is possible that the tradition itself is no more than a historical fiction, that at some point the law's origins had been attributed to a plebiscite as a sort of pedigree, a way of accounting for its authority by reference to the customary mode of legislation in the late Republic.[65]

Assuming, nonetheless, that at some point during the Republic a plebiscite was promulgated at the instance of one Aquilius, there is no need to suppose that it was a reform *ex nihilo*. For on the one hand the use of the plebiscite mode in this case lacks any demonstrable political or economic implications, and on the other the narrow technicality of its contents and the pedantry of its formulation are unequal to the role of a considered innovation. Rather, they evoke the adoption of an existing scholarly text or oral tradition. Honoré points out that the *terminus post quem* for the plebiscite could theoretically be as early as 449 B.C.E.,[66] but it is unnecessary to seek an early date if the plebiscite is not itself the origin of its provisions. They go back to an indefinable point in early Roman history, being an element of traditional legal learning that for some reason had not been canonized in the Twelve Tables.[67]

Conclusion

The Lex Aquilia is a source that goes back to a shadowy period of Roman law for which native historiographical traditions are unreliable. We do however possess a text which, if not entirely in its original form, retains enough thereof to discern the original focus of the law and the sequence of its clauses. That sequence has generally been regarded as arbitrary, but when placed against the background of far more copiously documented scholastic legal traditions from the ancient Near East, attests to a coherent set of provisions. They follow an organizational pattern widely employed in the ancient Near Eastern law codes, namely, the chronological sequence.

The organization of the ancient Near Eastern law codes is predicated upon the fact that they were not legislation in the modern sense but academic treatises, a part of a more general scientific tradition in which the same type of organizational patterns prevailed. While some of those patterns would not be inconceivable in a legislative reform, the sequence found in the Lex Aquilia is too pure an example of this type of academic discourse. Its structure was a consequence of its academic character.

The Lex Aquilia of classical Roman law was therefore the culmination of a two-fold process of transformation. On the one hand it developed from three technical rules on a narrow question of the point in time to which the assessment of damages should be referred to the general basis of liability for wrongful damage. On the other, it acquired the status of normative legislation, through insertion into a known legislative form and by juristic interpretation within that conceptual framework. Neither development affected

the integrity of the original text; rather, they were achieved by a change in attitude to the ancient source, a shift in the way the text was read.

In this respect Roman law reflects the same process that was undergone by the one ancient Near Eastern system to acquire a classical form, namely biblical law. For behind both cases lay an intellectual revolution, in which Greek philosophy replaced Mesopotamian science as the basis of jurisprudence. The original coherence of the Lex Aquilia, therefore, and its subsequent rereading, are emblematic of Roman intellectual as well as legal history.

Notes

1. An earlier version of this paper was presented in Oxford to the 1993 meeting of the Société Internationale de l'Histoire des Droits de l'Antiquité (SIHDA). It was read in manuscript by Professor P. Birks and Dr. A. Wygant, for whose comments and criticisms I am grateful. Responsibility for the content rests as usual with the author.

2. For a review of earlier theories as to the content of Chapter II, see Cannata 1994: 151–152.

3. Daube 1936: 266–268; 1948: 154–156; and 1947: 74–85.

4. Daube 1947: 85–98. In our view, the order of the biblical examples yields to a far different explanation. See the discussion of the organization of ancient Near Eastern law codes below (under "The Background to the Lex"). As regards the theft laws of Exod. 21:37-22:3, discussed by Daube (1947: 91–95), we have offered an entirely different interpretation; see Westbrook1988c: 111–128.

5. Col. IX 24–Col. X 32 and Col. XI 24–Col. XII 19, respectively. Edition in Willetts 1967.

6. Daube 1947: 84–85.

7. Daube 1936: 267–268.

8. Pringsheim 1959.

9. Pringsheim 1959: 238.

10. Pugsley 1969.

11. For example, the term *eras* has been replaced by *dominus*: *Dig.* 9.2, 11.6. Attempts at reconstruction inevitably rely on substitution of the author's words for those of the extant sources. See Kelly 1964: 73–83; 1971: 235–241.

12. Cf. the remarks of Crook (1984: 67–77) and his proposed text for Chapters I and III.

13. Gaius *Inst.* III 217–218 and Justinian *Inst.* 4.13.14 are paraphrases.

14. Lenel 1922.

15. See already Pernice 1867: 14. For a summary of the arguments, see Honoré 1972: 138–141.

16. Honoré 1972: 141–145.

17. Gaius states: "*Capite tertio de omni cetero damno cavetur*" ("In the third chapter, provision is made for all other kinds of damage," *Inst*. III 217), but fails to give other examples of loss by fraud, even though this sentence immediately follows his discussion of Chapter II. His examples are all extensions of the principle in Chapter I (on *damnum* = "loss," see Daube 1948: 93–156).

As evidence for the antiquity of the phrase, Honoré adduces *Dig*. 21.1.42, citing the aedilician edict *de feris*. The edict contained two specific provisions, dealing with killing and wounding a free man, followed by a residuary clause introduced by *ceterarum rerum* dealing with all other cases (Honoré 1972: 144). It may equally well be argued, however, that this edict provided the compilers with the model for interpolating the phrase in 9.2.27.5, since "other cases" is obviously restricted to other cases of damage by wild beasts kept contrary to the edict. It is thus parallel to a Lex Aquilia untrammeled by an intervening provision on an entirely different matter. The question is not whether the compilers invented the phrase but how it is used in the particular context. This distinction applies *a fortiori* to the other examples of *ceterarum rerum* adduced by Nörr 1986: 213–216, which are not genitives of respect.

18. The theory that the law originally referred to the next thirty days, propounded by Daube (1936), has been the subject of much debate. See Ankum 1983: 172–180, for a summary of the copious literature.

19. Daube 1936: 262–263.

20. Ankum 1983.

21. Ankum 1983: 178.

22. Ankum 1983: 177.

23. As, e.g., in Gaius *Inst*. IV 47. See Buckland and Stein 1966: 658.

24. The same reasoning has been used by some scholars to suggest that the phrase originally related to purely procedural matters connected with the trial. Thus Iliffe suggests: "The thirty day period in the third chapter may have referred to the period between the first appearance *in iure* and the second. The parties may have been required to make an *aestimatio* on the first appearance and then have been allowed to prove extra damage when the case was heard by the *iudex*. Alternatively, they may not have needed to do more than, as we should say, 'show cause' on the first appearance" (1958: 503–505). Similarly, for Kelly the thirty days represent "the time within which compensation—on the perfectly simple basis of *quanti ea res erit*—shall be payable" before the judgment debtor became liable to *mantes iniectio* (1971: 239–241). It is not clear to us why procedural provisions that must have been of general application under the *legis actio* should be linked to one particular action. It is certainly not the case with comparable provisions in the Twelve Tables, such as *in ius vocatio*.

25. As Pernice (1867: 15) put it in arguing for Gaius' *fuerit* as the original verb: ". . . und sodann erhielten wir damit den vollkommen sachgemessen Sinn: wieviel die Sache werth gewesen sein wird, d.h. wieviel der Richter finden wird, daß die Sache werth gewesen sei." ("So now we have arrived at the perfectly adequate

meaning: what the worth of the property will have been, that is, what the judge will find the worth of the property to have been.") (It would also account for Gaius' gratuitous use of *fuerit* over *fuit* in his discussion of Chapter I in *Inst.* III 214.)

26. See, e.g., Barthélemy et al. (1979: ix): "When a text was particularly difficult, there was a tendency for ancient scribes and translators to simplify the text by employing more fitting lexical, grammatical, and stylistic forms (these modifications are often spoken of as 'facilitating')." Nörr (1986: 217) suggests that *erit* might have been a mistranslation of an archaic Latin verb, especially since archaic Latin lacked precision in dealing with *consecutio temporum*. Be that as it may, the *concept* of past, present, and future time was certainly not lacking in early Rome, and it is pointless to speculate about the ambiguities of a putative Urtext that we do not have, when *consecutio temporum* is clearly expressed by the received text that we do have.

27. Cf. the reconstruction of Cannata 1994: 151. Gaius mentions two further provisions of the Lex Aquilia, a double penalty against one who denies the accusation (*Dig.* 9.2.2.1, *Inst.* III 216, cf. Ulpian *Dig.* 9.2.23.10 and Paulus *Dig.* 9.2.24) and noxal liability (*Inst.* IV 76, cf. Ulpian *Dig.* 9.4.2.1). It is difficult to know what form these provisions took, whether separate chapters like the first three or subclauses within those chapters or suggestive terms in the three chapters that were interpreted as laying down these rules. Since both are secondary rules, not special to the Lex Aquilia, the first possibility is the least likely. On the insertion of subordinate rules, see n. 36 below.

28. G. III 117; see Buckland and Stein 1966: 443–444.

29. This conventional view of *acceptilatio* has been challenged by Lévy-Bruhl, who argued that *acceptilatio* in Chapter II meant receipt of a real payment and that the fraud was therefore nothing more than failure to pay over to the debtor the sum received (1958: 507–517). His reasoning is that the phrase *acceptum facere* "ne décèle aucune idée de fiction. Elle désigne le comportement du créancier qui se déclare satisfait" ("does not indicate any notion of a fiction. It designates the behavior of the creditor who declares himself satisfied," 1958: 510). The second proposition, however, does not complement the first. The phrase describes the creditor's state of mind, not an objective state of facts. Precisely because it will apply whether the debt has actually been paid or not, it is an ideal vehicle for a fictional payment. Cf. Watson, who points out that *acceptum facere* is a technical legal term, which always means "to make an *acceptilatio*" (1991: 196). Real payment is a possibility, it is true, but for the purposes of the *acceptilatio* it is irrelevant. Furthermore, the existence of such a fiction has a clear rationale: it is sometimes expedient for creditors to remit obligations. In the context of *adstipulatio*, the most obvious example of fraud that springs to mind is remission of an obligation in pursuance of a corrupt bargain. This is dismissed by Lévy-Bruhl as "rarissime" (1958: 511), an assessment that we would question, but in any case the validity of legal rules does not depend on statistics, and, however rare, the possibility is a real and present danger of the sort that laws exist to guard against. Failure

to pay over the debt to the principal creditor, on the other hand, is fraud not in respect of the *acceptilatio* but of a collateral contract (cf. Cannata 1994: 154). Both aspects will be covered by the classical contract of mandate, but the one that is likely not to have been covered in an earlier period (unless one believes that mandate sprang into existence overnight and fully grown) is the fraud wherein the *adstipulator* acts legally in form but not in substance. It will only be caught by the principles of good faith developed by the jurists of the late Republic.

30. The seven cuneiform codes are: Codex Ur-Namma (Sumerian, twenty-first century B.C.E.), Codex Lipit-Ishtar (Sumerian, twentieth), Codex Eshnunna (Akkadian, eighteenth), Codex Hammurabi (Akkadian, eighteenth), Hittite Laws (Hittite sixteenth–thirteenth), Middle Assyrian Laws (Akkadian, twelfth), Neo-Babylonian Laws (Akkadian, sixth). A recent translation of all these codes is to be found in Borger et al. 1982 and Roth 1997. The two Hebrew codes are found inserted into the narrative of the Pentateuch. They are (part of) the "Covenant Code" (Exod. 21:1–22:19) and the Deuteronomic Code, which consists of provisions scattered through the book of Deuteronomy, with the main concentration in chapters 15, 21, and 22. The Deuteronomic Code is usually associated with the reign of king Josiah (seventh century), and the Covenant Code is thought to be somewhat earlier, although not even an approximate date can be assigned with confidence.

31. See esp. Petschow 1965, 1968; and Eichler 1987.

32. Petschow 1968: 137–138.

33. Petschow 1965: 166.

34. Westbrook 1995b: 168–172.

35. On the structural coherence of the Gortyn Code, see Gagarin 1982.

36. Free/slave sequences usually concern the status of the victim, but in the provisions of the Hittite Laws 93–100 we find the sequence: burglary of house, burglary of granary, arson of house, arson of barn, on which is imposed a free/slave sequence concerning the culprit, which lays down noxal liability. Noxal liability might possibly have been dealt with in the Lex Aquilia in a similar way. See n. 27 above.

37. E.g., Festus 550.3; Gell. *NA* 20.1.12, 14; Paulus, *Collatio* II 5 5.

38. See e.g., Codex Eshnunna 42–47, esp. 42, Codex Hammurabi 196–205, and Hittite Laws 7–9 and 11–16. Cf. Westbrook 1988a: 106–108.

39. Westbrook 1988a.

40. E.g., David 1950: 153–154. Cf. the response of Yaron 1966. The nature of possible connections between similar laws is discussed by Malul 1990: esp. 133–139.

41. See our earlier discussion of this question in Westbrook 1988a: 82–97, and further in Westbrook 1989a, with a summary of the opposing views. Two recent studies take up more extreme positions in favor of the legislative character of the codes on the one hand and of their scholastic character on the other: respectively, Leemans 1991: 409–420, and Malul 1990: 105 n. 13.

42. Eichler 1987: 81. See also Westbrook 1995b: 159–163.

43. The literature is summarized by Pressler 1993: 45–62, to which should be added Otto 1991: 290–306.

44. See Westbrook 1988a: 119–121; and 1989a: 218–222. Daube has demonstrated the reliance of Tannaitic jurisprudence on Greek systems of logic in their interpretation of biblical texts (Daube 1992). It is important to understand that our thesis proposes a more fundamental change than does Daube's. Being unaware of the earlier phase represented by Mesopotamian science, Daube assumes that the biblical codes were legislation and that Rabbinical interpretation was merely a more sophisticated version of existing canons of statutory interpretation.

45. For an overview, see Rawson 1989: 448–476. We would draw particular attention to Rawson's discussion of the unconscious infiltration of Greek thought on the one hand (1989: 448–449) and the influence of Greek scientific method on the other: "A Greek treatise on almost any subject, a *techne* or, as the Romans were to say, an *ars* (as both subject and treatise were known) first defines its subject, and then subdivides it, going on to deal separately and in order with the various parts, kinds or aspects. This is a method that goes back through the great philosophers to the sophists, who first taught the Greeks to think and speak in an orderly fashion. In the first century B.C.E. at Rome Varro treated agriculture on this model, criticizing all his predecessors, including Cato, for not starting with an accurate definition of the subject and for including irrelevant material. In fact, it seems pretty clear that it was only from the start of the first century that Greek method was used by the Romans for organizing treatises on any subject—rhetoric, grammar and the rest" (1989: 456–457).

46. Tellegen-Couperus 1993: 50–51; cf. Lee 1956: 393.

47. Beinart 1956: 70–80.

48. Von Lübtow 1971: 15–16.

49. In attempting to find some social dispute to explain the origin of the Lex Aquilia, however, von Lübtow appears to adopt the very approach that he has just rejected in Beinart's theory. He suggests that the occasion for the law was disputes between patricians and wealthy plebeians over *ager publicus*, "bei denen gegenseitige Gewaltakte stattgefunden hatten, deren zivilrechtliche Sühne eine zusammenfassende, abschließende Regelung verlangte" ["disputes during which reciprocal acts of violence had taken place, the civil penalties for which required a comprehensive final regulation"—Eds.] 1971: 16).

50. Theophilus states that the law was passed at the time of the dissension (*diastasis*) between the *plebs* and the patricians (*Paraphrasis* 4.3.15), and the scholiast to the *Basilica* that it was the work of Aquilius, who was the *plebs'* leader when they rebelled against the patricians and seceded from them (*Schol. ad Bas.* 60.3.1).

51. Cf. Livy III 55; Gaius *Inst.* I 3; Justinian *Inst.* 1.2.4.

52. Gordon 1976: 315–321; Honoré 1972: 145–146; and von Lübtow 1971: 15–16.

53. 9. *et cum sciret de damno legem esse Aquiliam*, *tamen hoc ita existimavit*, *apud maiores nostros*, *cum et res et cupiditates minores essent et familiae non magnae magno metu continerentur*, *at perraro fieret*, *ut homo occideretur*, *idque nefarium ac singulare facinus putaretur*, *nihil opus fuisse iudicio de vi coactis armatisque hominibus . . .* 10. *his temporibus*, *cum ex bello diuturno atque domestico res in eam consuetudinem venisset*, *ut homines minore religione armis uterentur*, *necesse putavit esse . . . et poenam graviorem constituere*, *ut metu comprimeretur audacia*, *et illam latebram tollere DAMNUM INIURIA* ("and though he knew that the Aquilian law about damage existed, still he thought, that, as in the time of our ancestors both men's estates and their desires were less, and as their families, not being very numerous, were restrained by fear of important consequences, it very seldom happened that a man would be killed, and it was thought a nefarious and unprecedented atrocity; and therefore, that there was at that time no need of a system of judicial procedure with reference to bodies of men collected in a violent manner and armed; . . . In these times, when after a long civil war our manners had so far degenerated that men used arms with less scruple, he thought it necessary . . . to affix a severe punishment, in order that audacity might be repressed by fear, and to take away that outlet, 'Damage unjustly caused.' " (*pro Tullio*, 4. 9–11, trans. C. D. Younge. London: H. G. Bohn, 1856) [Perseus]).

54. Honoré 1972: 147–150.

55. Inflation is to be distinguished from seasonal fluctuation of prices, which is identified by Cardascia (1974: 62–64) as the rationale for the retrospective highest value in Chapter I.

56. Birks 1994: 181–188.

57. Birks (1994: 184) imagines the following scenario: "The debt of 5000 *asses* in this state of affairs might require a payment of only, say, 300 *denarii*, though the exact number will not be discoverable except through a bargain between the parties. . . . The honest debtor will offer what he perceives to be the going rate, say 300 *denarii*, and he will insist that, if he pays that sum, the debt must also be artificially discharged. . . . The discussion will very likely end in compromise. The debtor will pay 325."

58. "The conscientious *adstipulator* will do his best to defend his principal's interest. He will try to push the debtor up to, say, 350. . . . If these same parties are less than perfectly honest they will see that the unstable currency conditions leave room for secret advantage to themselves. The *adstipulator* will be easily tempted to do a deal with the debtor. He will discharge the debt at a not wholly implausible 280 *denarii*, so long as he receives 20 into his own pocket" (Birks 1994: 184).

59. *Dig.* 9.2.1. Note, however, that Ulpian merely says *derogavit*; he does not suggest that the passing of the statute abrogated existing laws.

60. Daube 1936: 255.

61. Westbrook 1988a: 95–97.

62. Westbrook 1988c: 39–77.

63. Paragraph 10 of the Hittite Laws for good measure adds a small fixed payment to the compensation. §104, incidentally, sets a fixed payment for cutting down trees, while §98 applies indemnification of loss where the culprit burns down a house.

64. Our arguments are set out in Westbrook 1992b: 61–64. On the voluntary nature of the second category, see Cardascia 1985: 200–207.

65. Methodologically, a distinction should be made between the received text of a law and an historical notice about a law. The former is a primary source which has been transmitted because of its function, namely, its use by succeeding generations of lawyers as a source of law. Even if we question the authenticity of parts of the present text, there is no reason for us to dismiss the whole as a fabrication. The historical notice, on the other hand, is not a primary source, nor can it claim any ongoing legal function.

Ulpian's statement about the legislative pedigree of the Lex Aquilia is of no legal significance: it was not necessary for citation or for establishing the validity of such an old law, which Ulpian in any case examined through the prism of the praetorian edict. It therefore falls within the second category: it is an historiographical assertion about an *event* that took place more than five hundred years earlier. We must judge it by the same criteria by which we judge the works of native Roman historians (one of which was possibly the source of Ulpian's statement). Those works can certainty not be read uncritically, as if their sources were primary, their purpose objective, and their understanding of former times not tainted by the projection backwards of conditions prevailing in the writer's own time.

66. Honoré 1972: 146; see also Thomas 1976: 19. Biscardi (1967: 75–88) argues for an early date on the basis of Gaius *Inst.* IV 37.

67. Ulpian provides a *terminus ante quem* by citing an interpretation of the consul M. Iunius Brutus (*Dig.* 9.2.27.22), a jurist of the second century B.C.E.

CHAPTER EIGHT

Vitae Necisque Potestas

Abstract

The Latin expression *vitae necisque potestas*, "power of life and death," is used in a variety of classical legal and literary texts. This article locates the origins of this phrase in legal language from the ancient Near East. It also attempts to demonstrate how the transmission of scholastic traditions from the Near East to the Mediterranean world may have led to the incorporation of this phrase in early Roman law.

I

The purpose of this article is to trace the vicissitudes of a notorious phrase and its congeners. The Latin phrase *vitae necisque potestas*, "power of life and death," is replete with paradox. It was intimately associated with Roman law but at the same time was so beloved of Roman poets, historians, and philosophers that its legal meaning has become lost in a tangle of figurative and metaphorical usages.[1]

The essential feature of the phrase, which gives it its dramatic appeal, is its duality: "life and death" or more precisely "life and killing" (*nex*). But that duality reveals an inherent imbalance. It accords the right to change another's state from live to dead (*necis potestas*), but there appears to be no concomitant right to change from dead to live, for the obvious reason that it is impossible to raise the dead. Our objection may seem not only pedantic but unnecessary, for, it will be argued, the duality surely refers to the element of choice: to kill or not to kill. From a legal point of view, however, the duality of expression is superfluous in such a case, because every legal right in

[Originally published in *Historia* 48/2 (1999): 203–223. Reprinted with permission of the family of Raymond Westbrook, which we gratefully acknowledge.—Eds.]

the form of a power by definition involves that same element of choice—to do or not to do. The right to kill in itself gives the right-holder the choice between killing and not killing.

The phrase is used in Roman sources primarily in respect of three relationships: master and slave, ruler and subject, and father and son (or daughter). In the first of these, master and slave, both law and practice are straightforward. The standard statement of the law is found in a passage of Gaius, a jurist of the second century A.D., which is repeated in later legal sources:

> *In potestate itaque sunt servi dominorum. quae quidem potestas iuris gentium est. nam apud omnes peraeque gentes animadvertere possumus dominis in servos vitae necisque potestatem esse . . . sed hoc tempore neque civibus Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire. nam, ex constitutione sacratissimi imperatoris Antonini, qui sine causa servum suum occiderit non minus teneri iubetur quam qui alienum servum occiderit.*[2]

Gaius' understanding of the phrase is clear: a master may kill his slave without cause, at a whim, and not be answerable at law for his action. He also informs us that this principle was valid law until fairly recently, when it was moderated by express legislation. That Gaius' account conformed to practice is confirmed by a tale told by Seneca in his essay *On Anger* (3.40.1–3). A certain Vedius Pollio, while the emperor Augustus was dining at his house, ordered a slave boy who had broken a cup to be fed to his lampreys. The boy took advantage of the emperor's presence to beg not for his life, but that he be given a less horrible death. The interest of the story for us is the assumption of Vedius Pollio that even in the presence of his ruler he could with impunity kill his slaves for no cause other than his own anger.

It is not surprising therefore that the phrase when used of rulers does not generally have a positive sense. A phrase that characterizes political power as arbitrary and unlimited is consonant with absolutism rather than with constitutional authority. For Cicero it is the essence of tyranny: *sunt enim omnes, qui in populum vitae necisque potestatem habent, tyranni, sed se . . . malunt reges vocari.*[3]

Far be it, then, from Roman authors to associate the phrase with their own constitutional machinery; it was regarded rather as characteristic of barbarian rulers. According to Sallust, the deposed Numidian ruler Adherbal bewailed the fact that in seeking to exercise his royal functions, his power of life and death depended on the assistance of others.[4] Caesar, who has a predilection for the phrase in describing barbarian customs, attributes

it to the Haeduan Vergobretus and to German leaders appointed to conduct a war (*BGall.* 1.16; 6.23). At Rome, the only named ruler to whom the power is attributed is Nero, and for good reason: *et usque ad Neronem quidem senatus auctoritas valuit, qui sordidum et impurum principem damnare non timuit, cum sententiae in eum dictae sint, qui vitae necisque potestatem atque imperium tunc tenebat.*[5]

It is significant that the text distinguishes constitutional authority (*imperium*) from the arbitrary *vitae necisque potestas*. Seneca, in his essay *On Anger*, appears to attribute the latter power to a judge, but on a level of abstraction that precludes direct connection with a Roman judicial office.[6]

The content of the phrase in the third relationship, that of father and son, is less clear. On the one hand, the phrase is deeply rooted in the legal relationship between them, as is shown by the formula used in the ancient ceremony of *adrogatio*, a type of adoption. The *Pontifex Maximus* proposed to a council of the people (*comitia curiata*) that the adoption be approved in the following words: *velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est.*[7]

On the other hand, the extent of that power was not necessarily the same as that of a master over his slave. It is true that Dionysius of Halicarnassus attributes to Romulus a law giving a father total power over his son (2.26.4; cf. Dio Chrys. 15.20), including the right to kill him, but a legal source is rightly puzzled by the resulting inconsistency, even in early law. According to the Theodosian code: *libertati a maioribus tantum inpensum est, ut patribus, quibus vitae in liberos necisque potestas permissa est, eripere libertatem non liceret.*[8]

For later law, the power was a dead letter, although abrogated by no specific statute, unlike the power of a master. A constitution of Constantine includes within the ambit of parricide the case of fathers killing sons (*Cod. Theod.* 9.15.1), which had been notably absent from the earlier *Lex Pompeia de Parricidiis*.[9] Not all killing was parricide, however. A text in Justinian's *Digest* attributed to Ulpian (3rd century A.D.) states: *inauditum filium pater occidere non potest, sed accusare eum apud praefectum praesidemve provinciae debet.*[10]

Even if it is, as has been suggested, an interpolation by Justinian's compilers,[11] it attests to the persistent idea that a father could kill his son for cause, arrogating to himself the jurisdiction of a court of law for this purpose. Although the principle that a son's serious crimes were under the jurisdiction of the courts, not the family, may have been established by the

time of Constantine (*Cod. Theod.* 9.13.1), a residual right of the father to kill his son for cause appears to have survived even in the later law. The *Digest* records with approval a decision recorded by Marcianus:

> *Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.*[12]

It is implied that the father had a right to kill his son because of the son's offense and was only punished because he went about it in an unacceptable way. Indeed, when we look back at the earlier accounts of fathers killing sons, the question of justified punishment for an offense is always the key element. In an imaginary case used by Quintilian as material for a declamation, the same offense, actually incest with his natural mother, leads to the son's death in the family home at his father's hands, after torture to ascertain the truth, the father invoking *vitae necisque potestas* (*Decl. mai.* 19.5).

Likewise, three famous historical cases, reported in multiple sources, purport to reflect practice during the Republic. Our concern is not with the genuineness of the reports but with the assumptions on which they operate.[13] Disregarding the conflicting details of the different versions, then, the three stories are:

a) a tribune of the plebs, Spurius Cassius, after he had relinquished his office, was tried and executed by his own father for the crime of seeking the kingship (Val. Max. 5.8.2; Livy 2.41.10);
b) Aulus Fulvius was killed by his own father when he went to join the Catilinarian conspiracy (Val. Max. 5.8.5; Sallust. *Bell. Cat.* 39.5; Dio Cass. 37.36.4);
c) Quintus Fabius Maximus had his son killed, apparently for some sexual misconduct (Val. Max. 6.1.5; Oros. 5.16.8).

Only in the third case is it reported that the father suffered punishment for his act (Livy 2.41.10; Oros. 5.16.8). The assumption in all cases is that the father had the right to kill his son for the commission of an offense for which he would otherwise have been tried and executed by the public authorities. The father's right is called into question only where it is less clear that the offense or the evidence justified the father's action.[14]

Daughters were presumed by later writers to have been subject to the same *vitae necisque potestas* as sons in early law,[15] but the few accounts of early practice as there are place the father's action in the context of preserving his daughter's chastity. One Aufidianus is supposed to have killed his

daughter for unchastity with a slave, along with the slave himself (Val. Max. 6.1.3), and one Philiscus is likewise said to have killed his daughter for illicit intercourse (Val. Max. 6.1.6). In Livy's dramatic account, Verginius slew his daughter to save her from being raped by the tyrannical decemvir Appius Claudius (3.48.4–7). Livy has him ask the revolutionary mob not to regard him as a parricide, assigning guilt for the deed rather to Claudius himself (3.50.5–7).

Control over the daughter's sexuality through *vitae necisque potestas* raises the question of a husband's power over his wife. Although the phrase is never used of husband-wife relations, at least not at Rome,[16] tradition had it that in early law a husband could kill his wife for drinking wine, otherwise a public offense, or for adultery (Dion. Hal. 2.25.6; Gell. *NA* 10.23.3–5; Pliny *Nat. Hist.*14.14.89–91). The significance of the latter right will become evident when we examine ancient Near Eastern sources.

Nothing in the law and practice discussed above serves to resolve the imbalances that we noted in the phrase itself: that one can only kill, not bring alive, and that the choice of killing or not killing does not require the duality of expression. In spite of its legal functions, which tend to require terminological rigor, the dual phrase seems to be no more than a pleonasm.

Harris claims that its duality is nonetheless significant and can be explained by connecting the phrase with two practices: exposure of infants at birth and a father's recognition of his new-born child (*filium tollere*).[17] By recognition in the first few days during which an infant might be exposed, the father was giving it life. There are at least three objections to this.

1. The phrase is never associated with exposure of infants. Indeed, its most established legal use in the father-son relationship is in the ceremony of *adrogatio*, the adoption of an adult. Harris' response—that the phrase was never thought of as applying exclusively to infants—raises the question whether it was thought of as applying to infants at all. The question of infant exposure or recognition could not be more irrelevant to the legal relationship being created by the ceremony.
2. Exposure was not necessarily the prerogative of the father. In Dig. 40.4.29, for example, it was carried out by the mother. Mothers are never endowed with *vitae necisque potestas*.
3. The phrase does not apply only to fathers, but, as we have seen, applies equally to slave owners, who could have no possible connection with the decision to expose or recognize infants; and *a fortiori* to political rulers.

Accordingly, Harris' explanation must be rejected as too speculative, since it is based on no evidence but merely on a situation to which the wording of the phrase might logically apply. Nevertheless, Harris' approach is valuable, in that it points to the necessity to find a separate function for *vitae necisque potestas*. No evidence for such a function has been found in Roman sources, but, as we shall see, there is abundant evidence from the ancient Near East.

II

In a short article published more than thirty years ago, Yaron drew attention to the similarity between the phrase *vitae necisque potestas* and a widespread expression from the ancient Near East.[18] It is often said of a king that "he kills; he makes live." For example, Hittite Laws 187 reads: "If a man sins with a bull, it is an abomination; he shall die. They shall bring him to the royal gate. The king may kill him; the king may make him live.[19] But he shall not come near the king."

Through this and the many other examples of the phrase, the true content of its second leg, "make live," is revealed. It refers to the king's prerogative of pardon. The reason for the dual character of the phrase thus becomes apparent. It expresses a choice, not between action and inaction but between two different types of action: to execute the criminal or to pardon him. The two acts are theoretically independent of each other, and, as in modern legal systems, might be in the hands of different persons. For example, a letter to king Ashurbanipal praises the benefits of his rule: "He for whose crime death had been ordered, my lord the king has made live; he who had been a prisoner for many years, you have redeemed; he who had been ill for many days has recovered."[20]

There still remains the inherent imbalance that we noted in the Latin phrase, namely, that in spite of its wording, the power is only to cause death, not to bring to life. Again, closer scrutiny of the ancient Near Eastern sources provides this missing element.

The first point to note is that there exists one type of ruler for whom aspects of the power are perfectly feasible. The Bible tells us (1 Sam. 2:6): "The Lord puts to death and makes live; he brings down to the Netherworld and he brings up."

Mere mortals, on the other hand, cannot make the dead live. Or can they?[21] The law has remarkable powers: it can make a man a woman or a woman a man, a live man dead or a dead man live—in law, that is. Consider the following law in Deut. 17:6: "The dead man shall be put to death

on the word of two or three witnesses; he shall not be put to death on the word of one witness."

The apparent absurdity of this literal translation disappears once we realize that it is legal death that is in issue.[22] A man who has been found guilty of a capital offense is deemed dead in the eyes of the law; his physical death must await his execution, which is not a foregone conclusion. For, as the prophet Ezekiel puts it (18:32): "Do not desire the death of the dead, says the Lord God; so repent and live."

The concept is illustrated by a letter to king Ashurbanipal from one of his officers. The letter begins by reporting success in a minor skirmish, but it then emerges that the officer is in disgrace due to an earlier military disaster: "Since Birat was sacked and its gods carried off, I am dead (*mītu anāku*). Had I but seen the golden ring of my lord the king, I would have lived (*abtaluṭ*). But behold, when I sent my messenger to my lord the king, I did not see the ring of my lord the king, and I did not live (*ul abluṭ*). I am dead (*mītu anāku*); let my lord the king not forsake me!"[23]

Clearly, the death in question is figurative, referring to the officer's disgrace. The king has punished him in some way, and the officer seeks a reversal of that order. There is hyperbole in the officer's statement in that he compares his punishment to a death sentence, but the principle is not affected. The sequence of events narrated is: (1) punishment; (2) petition for remission of punishment (messenger, see the king's ring); and (3) rejection of petition (not see the king's ring). "Dead" refers to the original punishment, whereas "live" and "not live" refer to the petition and its failure. Of course, as a result of that failure, the officer remains in his previous status, hence repetition of the term "dead."

In Isa. 38:1 (= 2 Kings 20:1) king Hezekiah falls seriously ill. God informs him through the prophet Isaiah: "Put your house in order, for you are dead and you shall not live." As in the letter of the Assyrian officer, "dead" refers to Hezekiah's status as a condemned man. Sickness was regarded in the ancient Near East as, *inter alia*, divine punishment for sin, and a mortal illness was therefore a death sentence.[24] "You are dead" thus means that Hezekiah has been found guilty of a capital sin by the divine judge. "You shall not live" means that he can expect no mercy. Hezekiah, however, refuses to take God at his word and begs for mercy (vv. 2–3), with the result that God eventually relents somewhat and grants Hezekiah another fifteen years of life (vv. 4–5). The message is that prayer and repentance may soften even the harshest decision, at least where the divine king is concerned.

In the light of these examples, we see that the notion "make live" is a perfectly logical counterpart to "kill." The condemned man is, legally

speaking, dead, and the effect of pardon is to bring him back to life again.[25] It should be noted in passing that we have moved in these examples from transitive to intransitive verbs, from "kill" and "make live" to "die" and "live." All this means is that death sentence and pardon are being looked at from the condemned man's point of view, rather than that of the judge.

So far we have been examining the dual phrase, but there is no reason why "live" or "make live" should not be used alone to indicate pardon, or even to indicate by ellipsis the whole process of condemnation and pardon, if the context is sufficiently suggestive. In the "Nippur Homicide Trial," an account from the early second millennium B.C.E. of a trial for murder before the Assembly of the city of Nippur, three men conspired to kill a fourth and, when they had done the deed, informed the victim's wife.[26] She kept her silence. All four were brought to trial. One group in the assembly argued as follows: "As men who have killed a man they are not live men (lú.lú.ù in. gaz.eš.àm lú.ti.la nu.me.eš). Those three males and that female shall be killed before the chair (of the victim)." Another group, however, argued that mercy should be shown to the wife: "Even if Ninda daughter of Lu-Ninurta may have killed her husband, a woman, what can she do, that she should be killed?"

The Assembly then considered the wife's case and decided that she should be executed with the others. In this account, the facts had been proven; the only issue before the court was the possibility of clemency. It is therefore appropriate that the culprits are referred to by the group arguing against mercy not as "dead" but as "not live," i.e., not worthy of mercy.[27]

More than a thousand years later, a striking illustration of this elliptical usage is given in a report of a trial for high treason.[28] King Nebuchadnezzar II, having discovered a plot against him by a certain Babu-aḫḫa-iddina, "proved against him in the popular assembly the crimes that he had committed and looked upon him angrily and pronounced his not-living (lā balāssu iqbi), and his throat was cut" (lines 17–20). The narrative omits mention of the death sentence, which is self-evident in a case of treason, and focuses on the king's prerogative of pardon, which presupposes a death sentence. The death penalty for treason resulted from a conviction by a court (the popular assembly, not the king); "not-living" resulted from the king's decision to deny mercy.

Finally, the same metonymy explains an enigmatic biblical law. Exod. 22:17 reads: "You shall not make a witch live." The law, in our interpretation, is addressed to the local authorities.[29] It is understood that witchcraft is a capital offense. The purpose of the law is to forbid the local authorities to exercise a prerogative of mercy with regard to witches.

The effect of elliptical usage of one part of the dual phrase is to cast emphasis on that aspect. In certain contexts, when used as a speech formula, that emphasis is such as to give the phrase a slightly different nuance.

In 2 Kings 10:19, king Jehu issues an order summoning the priests of Baal, without exception, and adds: "Anyone who is missing shall not live." We understand from this that the penalty for disobedience is death, but it adds little to emphasize that the king will not pardon the offender. The emphasis lies rather in its focus on the final stage of judgment to the exclusion of the preceding stages. In the context of a speech formula expressing a peremptory order, truncation of the legal phrase is symbolic of truncation of the judicial process. The offender will be put to death summarily, without trial, without being able to offer an explanation or excuse. Failure to appear is proof of his guilt; there is no need for legal niceties and no question of pardon. The same is true in Gen. 31:32 when Jacob, accused by Laban of stealing his household gods, accepts a search of members of his household, declaring: "With whomever your gods are found shall not live."

The use of the truncated phrase as a peremptory order is not confined to the Bible. In a letter from Mari dating to the eighteenth century, an official reports,[30] "I assembled the sheikhs of the cities of the Binu-Yamina and I gave them the following strict order:[31] 'Whoever you are, if a single individual leaves your city and you do not seize him and bring him to me, in truth you shall not live.' "

Finally, returning to the Bible, in Exod. 19:12–13, we find the full dual phrase but separated in a way that changes its emphasis. Moses, about to ascend Mount Sinai, is instructed to warn the people: "Do not go up onto the mountain or touch its edge. Anyone who touches the mountain shall be killed. No hand shall touch him, but he shall surely be stoned or shot. Whether beast or man, he shall not live."

There is to be no trial but instant death for trespassers, as postponement of the element "shall not live" until after the mode of execution indicates. It is not clear who was to carry out the stoning or shooting. The order seems to allude to the posting of guards, but another possibility, that we shall now examine, is that it entitled ordinary Israelites to take law into their own hands.

In all the examples that we have examined from the ancient Near East the power of life and death is vested in the hands of the king or his delegates. The phrase is never used in connection with masters of slaves nor with fathers (with one partial exception that we shall discuss below). In cuneiform sources there is no hint that a master had the right to kill his slave under any circumstances.[32] The one explicit biblical law on the subject, Exod. 21:20–

21, punishes a master whose slave dies in consequence of legitimate punishment, unless death was not reasonably foreseeable. In the case of a father, the law is explicit: Deut. 21:18–21 requires a father desiring the execution of his wicked son to apply for a court order, and Codex Hammurabi 168–169 has the same requirement even for disinheritance.

There are, however, two key texts where the phrase is used in connection with private individuals. The first is a passage in the book of Zechariah (13:3):

> "But if a man continues to prophesy, his father and mother who bore him shall say to him, 'You shall not live, for you have spoken falsehood in the name of the Lord,' and his father and mother who bore him shall pierce him through because of his prophesying."

False prophesy was a form of apostasy, a serious public offense for which the death penalty is prescribed in the laws of Deuteronomy (18:20, cf. 13:5, 9–10; 17:2–5). According to those laws, execution was to be by the community and only after a public trial, with procedural safeguards for the defendants, or after a formal inquiry by the public authorities (13:1–16; 17: 2–7). In the prophetic passage, however, the situation is considered so serious that the culprit's parents are given the right to execute summary justice themselves, without going through the normal procedures. They assert that right by means of the speech formula "You shall not live," which as we have seen is normally used by rulers when they order summary execution.[33] For a brief moment, and in special circumstances, the parents are given the authority of a ruler or judge over a criminal: their own son.

The second text consists of three paragraphs of Codex Eshnunna, a law code from a kingdom to the north of Babylonia that slightly predates the Codex Hammurabi:

> 12 A man who is seized in the field of an ordinary citizen, in the sheaves at noon, shall pay 10 shekels of silver. He who is seized in the sheaves at night: he shall die, he shall not live.
>
> 13 A man who is seized in the house of an ordinary citizen, in the house at noon, shall pay 10 shekels of silver. He who is seized in the house at night: he shall die, he shall not live.
>
> 28 . . . If he makes the contract and libation with her father and mother and marries her, she is a wife. The day she is seized in the lap of a man she shall die, she shall not live.

Two situations are described which are familiar from the many parallels in laws from not only the ancient Near East but also Greece and Rome. The first is the burglar caught at night, and the second is the wife caught in

adultery. All the parallels share a common feature—the culprit is caught *in flagranti delicto*—and offer the same legal solution: the victim is entitled to kill the culprit on the spot without trial and is not liable for murder. The case of the burglar is found in the laws of Exodus,[34] of Solon,[35] and of the Roman Twelve Tables.[36] In all three the distinction is made between seizure by day, when the victim is not entitled to kill the burglar but only to claim the normal penalties for theft, and seizure by night, when he can kill with impunity. The case of adultery is found in the Hittite Laws[37] and the Middle Assyrian Laws.[38] In both, the husband has the right to kill his wife and her lover should he catch them *in flagranti delicto*, provided he kills both.

At Rome, the right of the husband in early law is described by Aulus Gellius, quoting M. Cato, thus: *in adulterio uxorem tuam si prehendisses, sine iudicio inpune necares*.[39] Augustan legislation (*lex Julia de adulteriis coercendis*) shifted the right from the woman's husband to her father but retained the old (i.e., ancient Near Eastern) learning on the circumstances, namely, that he was entitled to kill the lover provided he killed the woman at the same time.[40]

In our view, these parallels are no accident. The two cases are scholastic legal problems from Mesopotamian scribal schools, part of a body of learning that spread across the ancient Near East and even found its way into the Mediterranean countries.[41] The solution that we would expect in the Eshnunna laws is summary execution by the householder or husband, and by now we can see that the enigmatic formula "he shall die, he shall not live" is entirely appropriate. Here the formula is not truncated, but that is not surprising, as it is not a speech formula and the context in itself does not explain the right. Theft and adultery are not public offenses that have to be stopped at all costs, in which action might be expected of a private person.[42] If a private person is to be given the authority of a ruler, a reference to the full formula is necessary. "Shall die" establishes that the culprit is liable to the death penalty; "shall not live" establishes the modalities of its execution, namely, summarily at the hands of the victim. Were the victim to spare the culprit and bring him or her before a court, it is not clear that the result would be the same in both cases. The comparative evidence suggests that the adulterous wife might still suffer the death penalty but that the thief would receive a lesser punishment.[43]

To summarize the Near Eastern evidence: the dual formula was used in three situations. Firstly, and primarily, it was used to describe the dual right of rulers to condemn to death or to pardon a person guilty of a capital offense. In this situation, however, the right had one vital feature which has yet to be mentioned. As Yaron emphasizes, the phrase refers not to some

tyrannical whim but to a proper judicial discretion, the exercise of mercy as part of the normal, and desirable, functions of a sovereign subject to the rule of law.[44] This is only to be expected since ancient Near Eastern sovereigns were thought to have received a divine mandate to do justice and the legitimacy of their rule depended upon fulfillment of their divine mandate.[45]

The second situation is where a ruler in the proper context uses a truncated version of the formula as a speech formula denying mercy. From that context, the formula may be understood to refer to the ruler's right to impose summary execution for manifest infringement of a law or order.

Thirdly, in exceptional circumstances, the phrase may indicate the right of a private person to execute summary justice by killing a criminal himself. In those cases the right will constitute a defense to a subsequent charge of murder.

III

What then was its relationship with the Latin phrase and the very different institution attested at Rome? Yaron issues the following disclaimer: "A connection between the Eastern notions and Roman *vnp* is not suggested,—not because it is in itself impossible or unlikely, but rather because there is no evidence available to establish it. Since that is so, our case rests simply on the existence of similar notions in similar situations."[46]

On the face of it, however, neither the notions nor the situations are so very similar. The symbol of a legitimate king in one sphere is the symbol of tyranny in the other. A legal function attributed to Near Eastern kings is matched by a different legal function attributed to Roman masters and fathers. In the ancient Near East, the phrase is not associated with masters, who are not endowed with the right to kill their slaves, whether at will or for cause. With one partial exception that we have seen, the same applies to fathers. On the other hand, a key element of the institution in ancient Near Eastern sources, the right to pardon, is totally absent from the Roman sources.

Yaron suggests[47] that the sovereign nature of early Roman *patria potestas* provides a sufficient analogy, but to what? Not to early Roman kings, of whom the phrase is never used. Comparison between the two institutions can be drawn only on the basis of a historical development, which presupposes a historical connection. In our opinion, Yaron's caution is unwarranted and detracts from the importance of his insight. The key similarity of the phrases is in their form—that curious duality, illogical in Roman usage but logical in Near Eastern usage, through which the missing element in the

Roman usage is revealed. That combination of similar form and complementary meaning is in itself evidence of a literary dependency.

The literary dependency indicated by the dual phrase strongly correlates with the influence of ancient Near Eastern intellectual traditions on early Roman law as attested in the phenomenon of "law codes."[48]

In the ancient Near East, there was a recognizably distinct genre of literature that modern scholars refer to as law codes. In spite of being widely scattered in time (from the third to the first millennium) and place (Sumer, Babylonia, Assyria, Hatti, and biblical Israel), the nine extant examples show a striking similarity on several levels.[49]

The most immediate resemblance is in style: all are casuistic collections, that is to say lists of hypothetical cases ("If a man does X . . .") followed by an appropriate legal ruling ("his punishment shall be Y"). At a second level, they all share the same method of reasoning. Paragraphs are not concatenated at random but are organized in groups that follow certain set patterns. For example, a single case will be considered over the course of several paragraphs by varying the circumstances so as to alter the legal ruling, with frequent use of certain standard variations, e.g., if the victim were free or slave, male or female, etc. Thirdly, the same content is repeated from code to code, in varying degrees. Most frequently, the same basic case is found, albeit with different variants; sometimes the same variants are found; occasionally the very same legal ruling; and in a few instances the phraseology is so close as to be virtually a translation, leaving no doubt as to their dependency on a common literature.[50] Furthermore, crucial legal distinctions and evidentiary presumptions are also repeated, showing dependency on a common jurisprudence.[51]

The connection between these codes did not lie in the realm of legal systems or institutions but of ideas. The Near Eastern codes were not legislation as we understand it today. They belonged to a wider genre of "scientific" literature, which included divinatory, medical, and lexical texts.[52] All were presented in the form of lists of examples—in the case of the omens and their meaning and medical symptoms and their diagnosis, in casuistic form like the codes. This was Mesopotamian science: the attempt to understand phenomena by listing them in endless groups of associated examples. The law codes were lists of legal problems with their solutions, based upon a core of precedents expanded by extrapolation to theoretical variations. A canon of standard problems, such as the goring ox, the burglar caught at night, the wife caught in adultery, were used for didactic purposes and transmitted (orally) from generation to generation, which explains their recurrence in various law codes. As part of the wider scientific tradition, the legal canon

spread from Mesopotamia across the ancient Near East, occasionally finding written expression in documents such as those that we call law codes.[53]

The characteristic features of the Near Eastern codes are shared by early Roman laws such as the Twelve Tables and the Lex Aquilia. Examples from the canon of standard legal problems are found both within the law codes and in other sources recording traditions of early law. We have seen in our discussion above two such examples—the burglar caught by night and the woman taken in adultery—that relate directly to rights associated with the dual phrase. We therefore consider the Roman codes to have been a manifestation of the same scholastic tradition that lay behind the Near Eastern codes. Accordingly, we suggest that the various rights conceptualized by the dual phrase *vitae necisque potestas* may initially have entered Roman law as part of that scholastic tradition.

Quite apart from the evidence of the law codes, the time for reception of the dual phrase must be located in early Roman history, for two reasons. Firstly, the hoary antiquity attributed to the phrase by Roman tradition is confirmed by its role in the archaic ceremony of *adrogatio*.[54] Secondly, whereas the Near Eastern institution shows a clear and logical development by analogy from the royal prerogative, Roman usage is confused and contradictory, pointing to an inner-Roman development, or rather distortion, which may be linked to the vicissitudes of Roman history. For the central aspect of the Near Eastern institution, the prerogative of the ruler to pardon, would be most appropriate to the period of the kings, and by the same token the absence of this central aspect in the Roman version is accounted for by the caesura in Roman history that replacement of monarchy by the republic represents.[55]

The period of the kings is notorious for the predominance of legend over historical evidence. Moreover, if the connection was through an intellectual tradition, it would be unwise to seek a specific point of reception. Nonetheless, it can be said that the period of the last kings, with their Etruscan background, provides especially propitious conditions. On the one hand, the Pyrgi inscription attests to the penetration of Near Eastern elements into the constitutional structure of neighboring Etruscan kingdoms.[56] On the other, several scholars have identified the last Roman kings, of Etruscan origin, as the conduit through which the central elements of an ancient Near Eastern religio-political institution, the New Year Festival, were introduced into Rome.[57] The reason, according to Cornell, was that the sixth-century kings, in their search for legitimacy and charismatic authority, adopted Greek and Near Eastern models of kingship.[58] The dual formula, embodying a ruler's prerogatives of punishment and pardon, would have furnished just such a model.

IV

A reconstruction of the early history of the phrase *vitae necisque potestas* at Rome can, in the absence of contemporary native evidence, only be speculative. If it is descended from the Near Eastern institution, however, then evidence from the latter sphere places our speculations on a slightly firmer footing. We tentatively suggest the following scenario.

1. The prerogative of the kings of early Rome to execute and pardon, conceptualized in a dual phrase of ancient Near Eastern origin—*vitae necisque potestas*—disappeared with the Republic, under which an entirely different system of appeal (*provocatio ad populum*) prevailed.[59]
2. A right of summary execution by private citizens, conceived under the same rubric, existed in certain narrow circumstances, such as the thief caught by night, the wife caught in adultery, and those guilty of serious crimes caught by their parents. The right of parents became institutionalized, as evidenced by the use of the dual phrase in the formula of the *adrogatio* ceremony, and a faint echo of this right to kill for cause still existed in later law.[60]
3. A right of summary execution must also have existed for masters of slaves, but it is doubtful that originally it could be exercised without cause. One of the main factors tempering the harshness of slavery in ancient Near Eastern law was that a major source of slaves was citizens selling themselves or their children for debt. A curious feature of classical Roman law, by contrast, was the virtual absence of debt slavery.[61]

Early law had recognized the sale of children of citizens into slavery, probably for debt, as the protasis of IV 2 in the Twelve Tables reveals: *si pater ter filium venum duit*. . . .[62] There had also existed the widespread practice of taking citizens into debt bondage (*nexum*) which, if it was not slavery in strict law, in social reality amounted to the same.[63] Nexum, however, was abolished by the Lex Poetelia towards the end of the fourth century, and by the late Republic the sale of children had become a mere fiction to effect emancipation from *patria potestas* (Gaius *Inst*. I 132). Instead, expansion of the empire from the third century on radically changed the nature of slaveholding. The main source of slaves became foreign captives (and later their offspring), thereby opening the way to a much harsher attitude to slaves and the abandonment of all restraint on masters' powers.[64] For the classical jurists, the prisoner of war was the archetype of a slave and his

captive status the legal basis of slavery, by a mode of reasoning which brings us full circle to the rationale for the power of life and death in ancient Near Eastern jurisprudence.

Florentinus takes it as axiomatic that the origin of slavery was captivity in war: *servi ex eo appellati sunt, quod imperatores captivos vendere ac per hoc servare nec occidere solent*: *mancipia vero dicta, quod ab hostibus manu capiantur*.[65] On the other hand, according to Ulpian "slavery is equated with death."[66] The resolution of the apparent contradiction between these two statements lies in the concept which we have seen was central to the dual prerogative in the ancient Near East, that of legal death. For Ulpian elsewhere states: *in omnibus partibus iuris is, qui reversus non est ab hostibus, quasi tunc decessisse videtur, cum captus est*.[67] Although Roman law was interested only in Roman citizens captured by foreign enemies, the same principle would be equally valid for foreign captives of Roman arms. As Bradley puts it, the enslaved captive was regarded as being in a condition of suspended death at the discretion of his captor.[68]

4. By the late Republic, the master-slave relationship was the only legal relationship in which *vitae necisque potestas* was still a living institution. Based on the experience of that relationship, the phrase became a metaphor for unbridled tyranny in the political sphere, being now understood as the right of summary execution without cause.

Notes

1. E.g., Livy 2.35; Manilius *Astr*. 4.24; Pliny *Nat. Hist.* 29.11; Sen. *Ep. Mor.* 4.8, *Phoenissae* 103; Tac. *Hist*. 4.62.

2. "Slaves are under the power of their masters. This power is part of the law of peoples, for it is observable that among all peoples alike masters have power of life and death over their slaves. . . . But at the present day neither Roman citizens nor any other persons subject to Roman rule are allowed to treat their slaves with excessive and causeless harshness. For by a constitution of the late emperor Antoninus it is laid down that one who kills his own slave without cause is as much amenable to justice as one who kills another's" (I 52–53 = *Dig.* 1.6.1.1; Justinian *Inst*. 1.8.1–2).

3. ". . . for all who have the power of life and death over a people are tyrants, but they prefer to be called kings" (*Rep*. 3.23). The image of the tyrant is behind two examples of a fanciful adaptation of the phrase. Quintilian (*Decl. min*. 309) raises the imaginary case of a deflowered virgin to whom the law gives the right to choose between having her ravisher executed and having him marry her. The girl first chooses marriage but, the ravisher having denied the charge and lost his

case, changes her mind and opts for execution. The unhappy young man protests: *potestatem tibi vitae ac necis lex dedit*; *ultra regnum omne*, *ultra tyranidem omnem est hoc diu licere*. Pliny (*Nat. Hist.* 29.11), with scathing sarcasm, applies it to the power of fashionable doctors over their patients: *imperatorem illico vitae nostrae necisque fieri*.

4. . . . *incertus . . . an regno consulam*, *quoius vitae necisque potestas ex opibus alienis pendet* (*Bell. Iug.* 14.23). Cf. the reproach addressed to kings in Seneca's *Thyestes*: *vos quibus rector maris atque terrae ius dedit magnum necis atque vitae*, *ponite inflatos tumidosque vultus* (607–609).

5. "Even as late as the time of Nero, the power of the Senate prevailed, and the Senate did not fear to deliver speeches against a base and filthy emperor and condemn him who held the power of life and death and imperial authority" (*SHA* 13.8). Seneca, addressing the youthful Nero, puts the following reminder into his head: *ego vitae necisque gentibus arbiter*. As the following lines confirm, however, this does not refer to power over Roman citizens but over foreign nations (Sen. *Clem.* 1.1.2).

6. Seneca's discussion follows an example of abusive exercise of the death penalty which has as its subject a named Roman commander (1.18.3–19.8), presumably acting under the much wider discretion afforded by military discipline. It is not clear that the example is intended as an illustration of arbitrary power: the commander provides due grounds, albeit specious in Seneca's eyes, for the death sentences that he orders. Also beyond the constitutional sphere are Manilius' references to laws (*leges*) and scales (*examen*) of life and death. These powers are in the celestial sphere, belonging to Fate and the constellation Libra respectively. They assume judgments that are logical, equitable, and well-founded, even if from the perspective of humans they appear arbitrary (*Astronomica* 4.24; 5.49–50).

7. "By your permission and order, may Lucius Valerius be a son to Lucius Titius in law and statute, as if he had been born from that father and mother, and may he (Titius) have the power of life and death over him (Valerius), as a father has over a son" (Gell. *NA* 5.19.9; cf. Cicero *Dom.* 77.11; Seneca Maior *Controv.* 3.3).

8. "So much importance was attached to freedom by our forbears that fathers, to whom was granted the right of life and the power of death over their children, were not allowed to rob them of their freedom" (4.9[8].6.pr.). The fragmentary Autun commentary on Gaius first equates the powers of master and father, but then appears to distinguish them. Apparently, the author considers that in the case of a father, just cause is needed, but it is not clear from the broken context whether he regards this requirement as stemming from the Twelve Tables or from subsequent reform: *domino vel parenti et occidere eum et mortuum dedere in noxam . . . patria potestas potest . . . n . . . cum patris potestas talis est ut habeat vitae et necis potestatem. de filio hoc tractari crudele est*, *sed . . . non est post . . . r . . . occidere sine iusta causa*, *ut constituit lex XII tabularum* (Gaius *Augustod.* 4.85–86).

9. *Dig.* 48.9.1 (Marcianus). It is curious that Justinian's compilers failed to update the law in this case by interpolation.

10. "A father cannot kill his son without a hearing but must accuse him before the prefect or provincial governor" (*Dig.* 48.8.2).

11. Sachers 1953: col. 1087.

12. "It is said that when a certain man had killed in the course of a hunt his son, who had been committing adultery with his stepmother, the late emperor Hadrian exiled him to an island, because he killed him more by the law of a brigand than by the right of a father; for paternal power ought to depend on compassion not cruelty" (*Dig.* 48.9.5).

13. For this reason we have excluded from consideration isolated late accounts, such as Oros. 4.13.18. Other sources cited by Sachers 1953: cols. 1086–1087, as evidence of the father's right to kill his son, all concern a consul, dictator, military commander, etc., carrying out his public duty to punish a culprit in spite of the fact that the latter happens to be his son, e.g., Livy 4.29.5; 8.7.8; Cic. *Fin.* 1.7.23–24. Harris (1986: 82–87) adduces several further incidents where *vitae necisque potestas* might have been in issue. He attempts to assess the historicity of the incidents reported—in our view an impossible task. All of them were literary topoi that served a purpose in relation to the author's contemporary audience.

14. Cf. Seneca's account of a relatively recent case in which a father tried his son for parricide by family council and condemned him to exile rather than opting for the usual form of execution for parricides (Sen. *Clem.* 1.15.2–7). The preceding story of a father who was almost lynched for flogging his son to death lacks sufficient details to draw conclusions as to *vitae necisque potestas* (Sen. *Clem.* 1.15.1).

15. *Coll.* 4.8.1 (Papinian) attributes the father's power to the *leges regiae*. See the discussion of adultery below.

16. Cf. Caes. *Bell. Gall.* 6.19 on Gallic husbands.

17. Harris 1986: 93–95.

18. Yaron 1962: 243–251.

19. *huišnuzzi*, the causative form in Hittite from the verb "to live." In the Semitic languages, the intensive stem of the verb (a form that does not exist in Hittite) is used.

20. *ABL*, 2; edition in Pfeiffer 1935: no. 160, lines 21–22: *ša ḫīṭašuni ana muāte qabûni šarru bēlī ubtallissu*. Cf. *CAD* B 61–62 and Q 38. The separate nature of the two acts also emerges from the distributive use of the phrase, e.g., Esarhaddon's Succession Treaty (*SAA* II 6; edition in Parpola and Watanabe 1988: 36), lines 193–194: "he shall put to death him who is worthy of death (*ša duāki*); he shall pardon him who is worthy of pardon (*ša balluṭi*)."

21. The letter to Ashurbanipal cited above gives the ruler only an indirect role in the curing of the sick, for which the intransitive verb "to live" (=to recover) is used.

22. Standard translations ignore the word "dead man" (*mēt*) in the Hebrew text, even though the Septuagint tries to take account of it (*apothnēskōn*: "dying

man"). E.g., "the death sentence shall be executed" (Oxford Bible); "a person shall be put to death" (JPS); "on ne pourra être condamné à mort" (Bible de Jerusalem). Note that the Hebrew root **mt* meaning "man" is not attested in the singular.

23. *ABL* 259; edition in Pfeiffer 1935: no. 22: reverse 1–10.

24. See, e.g., *Šurpu* (edition in Reiner 1958), a series of incantations designed to remove sin from a sick man by means of confession and ritual purification. Cf. Num. 27:3 and 2 Kings 5:20–27.

25. Yaron already surmised this possibility: "by his god-like intervention [the sovereign] 'keeps alive,' perhaps even 'restores to life,' the offender who has been condemned to death" (1962: 248).

26. Edition in Jacobsen 1970: 193–214.

27. Cf. *ABL* 620 (edition in Waterman 1930–1936: no. 620): "I am one of killing; I am not one of making live."

28. Edition in Weidner 1954–1956.

29. Westbrook 1986a: 62–66.

30. Edition in Jean 1950: 122.

31. *ašputšunuti*. *CAD* translates *šapāṭu* "to issue orders" (Š/1 450) but for no apparent reason creates a second lemma (Š/1 451) with three examples—one uncertain, one in broken context, and this passage, which it translates "I informed(?) them. . . ." In my opinion, the first meaning applies here also. Confirmation is provided by examples of the noun *šipṭu*, "ruling, strict order, reprimand" given in *CAD* Š/2 93.

32. In the Hittite Instructions for Temple Officials, there is mention of killing a slave (lines 29–30): "If a slave should anger his master, either they kill him, or they harm his nose, his eyes, his ears." The unexpected shift to third person plural in the verbs of punishment shows, however, that the punishment was to be carried out by someone other than the master. (A full translation of the complete text is available in *ANET* 207–210.)

33. The difficulty of this phrase for commentators, and the strained rationalizations that result, are illustrated by a recent example: ". . . the sentence here is expressed somewhat less directly, perhaps to ameliorate the harsh and extraordinary circumstances whereby parents are called upon to execute their own children" (Meyers and Meyers 1993: 374).

34. "If the thief is caught breaking in and is struck dead, he has no blood. If the sun has risen on him, he has blood. He shall surely pay. If he cannot, he shall be sold for his theft" (Exod. 22:1–2).

35. "For a theft in day-time of more than fifty drachmas a man might be arrested summarily and put into custody of the Eleven. If he stole anything, however small, by night, the person aggrieved might lawfully pursue and kill or wound him, or else put him into the hands of the Eleven, at his own option" (Demosthenes, *In Timocratem* 113).

36. *SI NOX FURTUM FAXSIT, SI IM OCCISIT, IURE CAESUS ESTO. LUCI . . . SI SE TELO DEFENDIT, . . . ENDOQUE PLORATO* (VIII 12–13).

37. ". . . if the husband finds them (the adulterers) and kills them, there is no liability upon him" (§197).

38. Middle Assyrian Laws A 15 is a difficult text, the interpretation of which is the subject of debate among scholars. I translate as follows: "If a man seizes a man with his wife (and if) it has been established and proved with respect to him: (on condition that) both are killed, there is no liability upon him." See further Westbrook 1990: 551–554.

39. "If you should take your wife in adultery, you may with impunity kill her without trial" (Gell. *NA* 10.23.5).

40. *Coll.* 4.2.3–4, 6–7 (Paul); *Dig.* 48.5.21(20) (Papinian); *Dig.* 48.5.24(23). pr.-4 (Ulpian). In *Coll.* 4.8.1, Papinian is asked the following question: *cum patri lex regia dederit in filia vitae necisque potestatem*, *quo bonum fuit lege conprehendi*, *ut potestas fieret etiam filiam occidendi*. Many commentators have assumed *lex* to refer to the Twelve Tables (e.g., Watson 1975b: 42 n. 12), but since the extract is from Papinian's book *On Adulteries* and since it is given in the context of a discussion of the *lex Julia*, it would seem much more reasonable to conclude that it is the Augustan statute that is meant. See Rabello 1979: 36 n. 39.

41. The influence of ancient Near Eastern intellectual traditions on early Roman law is discussed in detail below.

42. Compare the case of Pinhas in Num. 25:7–8, who brought to an end a plague by summarily killing apostates.

43. The continuation of Middle Assyrian Laws A 15 cited above reads: "If he (the husband) seizes (the lover) and brings him before the king or the judges, (and if) it has been established and proved with respect to him: if the husband of the woman will kill his wife, he shall kill the man; if he cuts off his wife's nose, he shall turn the man into a eunuch and his whole face shall be mutilated; but if he frees his wife, he shall free the man." Codex Hammurabi 129 contains a similar rule. Yaron in a recent article claims antonymic use of the phrase "he shall die; he shall not live" is an empty flourish (Yaron 1993). While admitting that the right to kill the culprit caught *in flagranti delicto* is the most satisfactory legal explanation of the phrase in the Eshnunna provisions, he finally rejects that solution because the wording of the phrase "does not connect up." Curiously, Yaron fails to cite his earlier article on *vitae necisque potestas*, which provides the basis for our attempt in this article to demonstrate a connection between law and phraseology. It is true that the antonymic repetition could well be merely for emphasis in many of the texts in which it is used, but in a legal context we are entitled to look for a legal meaning, to assume more than a rhetorical flourish. This aspect of the problem is discussed by us in Westbrook 1997.

44. Yaron 1962: 248.

45. King Hammurabi, for example, states in the prologue to his law code: "(the gods) Anu and Enlil, in order to ensure the welfare of the people, named me, Hammurabi, the pious prince who fears the gods, to make justice in the land, to destroy the evil and the wicked, that the strong might not oppress the weak" (col. I, lines 27–49). See Wiseman 1962.

46. Yaron 1962: 248.

47. Yaron 1962: 248–249.

48. The following discussion summarizes our previous, detailed studies of this topic: Westbrook 1985a; 1988a; 1990: 547–556; 1995a. See also Yaron 1974.

49. Codex Ur-Namma, from the city of Ur in southern Mesopotamia (twenty-first century); Codex Lipit-Ishtar, from the city of Isin in southern Mesopotamia (twentieth century); Codex Eshnunna, from the eponymous city in central Mesopotamia (eighteenth century); Codex Hammurabi, from Babylon in central Mesopotamia (eighteenth century); Middle Assyrian Laws, from Assur in northern Mesopotamia (eleventh century); Hittite Laws, from Hattusas in Anatolia (various versions from seventeenth to twelfth century); Covenant Code = Exod. 21:1–22:16, from Israel (ninth century?); Deuteronomic Code = Deut. 21:1–25:16, from Israel (seventh century).

50. The most striking example is the rule concerning an ox goring an ox, which results in virtually identical texts in Codex Eshnunna 53 (in Akkadian) and Exod. 21:35 (in Hebrew). See Malul 1990: 113–152.

51. For example, the distinction between day and night in guilt for killing a burglar, discussed above; the distinction between town and countryside in presuming acquiescence of a woman in intercourse (Hittite Laws 197 and Deut. 22:23–26); the status of a woman who is betrothed but not married in cases of sexual misconduct (Codex Ur-Namma 6, Codex Eshnunna 26, Codex Hammurabi 130, Deut. 22:23–24).

52. See Bottéro 1992: 156–184.

53. The law codes of necessity contain only a small part of the body of knowledge that must have existed in the scholastic legal tradition. The reason for creating written codes varied. Codex Hammurabi, for example, was a royal apologia, designed to demonstrate primarily to the gods that Hammurabi had fulfilled his divine mandate to be a just king; see Finkelstein 1961: 91–104.

54. The *comitia curiata*, which was responsible for *adrogatio*, goes back to the period of the kings. See Heurgon 1993: 216–218; Linke 1995: 56–63.

55. It is no objection to say that the Twelve Tables and the Lex Aquilia are located by later tradition in the Republican period. The traditional dates for their promulgation can in no way be relied upon, and even if they are accurate, they do not preclude the possibility, highly likely in our view, of the legal traditions that they contain going back to a much earlier date.

56. For a recent translation of the Phoenician text, see Schmitz 1995.

57. Versnel sees the *ludi Romani* as an Etruscan New Year Festival of Near Eastern origin in which the king acted the part of Iuppiter (1970: 255–284). Cornell identifies the central ritual of the New Year festival—the "sacred marriage" between the king and a goddess—in the legend of Servius Tullius' relationship with the goddess Fortuna (Cornell 1995: 146–148). For a recent study of the Babylonian New Year Festival, see Black 1981. On the sacred marriage ritual by Near Eastern kings, see Renger 1975.

58. Cornell in fact denies that the rule of the so-called Etruscan kings resulted in Etruscan political or cultural domination of Rome (1995: 151–172), but this does not affect our argument, since he still attributes to those same kings the introduction of Near Eastern institutions into the Roman kingship.

59. The history of *provocatio* in the Republic is the subject of scholarly controversy, but it is agreed that purported instances in the regal period are fictions. See Bleicken 1959: esp. 333–339; and Lintott 1972.

60. Compare the case reported by Valerius Maximus (6.3.8): *Publicia autem . . . item Licinia, quae . . . viros suos veneno necaverunt, propinquorum decreto strangulatae sunt. Non enim putaverunt severissimi viri in tam evidenti scelere longum publicae quaestionis tempus exspectandum. itaque quarum innocentium defensores fuissent, sontium mature vindices extiterunt.*

61. The statement of principle for classical law is found in Paulus, *Sent.* 5.1: *qui contemplatione extremae necessitatis aut alimentorum gratia filios suos vendiderint, statui ingenuitatis eorum non praeiudicant: homo enim liber nullo pretio aestimatur.* Codex Theodosianus, as we have seen, projected this view back into early history (4.9[8].6.pr.). An exception, however, remained for the sale of newborn babies; see Buckland 1908: 421–422; and Yaron 1965.

62. "If a father sells his son three times . . ." On the connection between this provision and debt slavery, in the light of ancient Near Eastern sources, see Westbrook 1989b.

63. On the social reality behind *nexum* and the background to its abolition, see Richard 1986: 124–127; and Raaflaub 1986a: 208–217. On the legal nature of *nexum*, see MacCormack 1967: 350–355.

64. Bradley 1987; 1994: 13–14, 31–33, 39–42.

65. "Slaves (*servi*) are so called because generals have a custom of selling their prisoners and thereby *preserving* rather than killing them; and indeed they are said to be *mancipia*, because they are *captives* in the hand (*manus*) of their enemies" (*Dig.* 1.5.4.2).

66. *servitus morti adsimulatur*: *Dig.* 35.1.59.2. Cf. *Dig.* 50.17.209 (Ulpian).

67. "In every branch of the law, a person who fails to return from enemy hands is regarded as having died at the moment when he was captured" (*Dig.* 49.15.18). The doctrine of *postliminium* may therefore be regarded as the equivalent of pardon in that it brought back to life a person who was legally dead.

68. Bradley 1994: 26.

The Origin of *Laesio Enormis*

Abstract

[The doctrine of *laesio enormis* in the Codex Justinianus allows a seller of land to rescind the contract if the sale price was less than half the just or true price, or give the buyer the option of paying the difference. It has been argued that this law, which conflicts with the classical Roman law of sale, derives from Rabbinic law. This, however, begs the question of how such law would have become known to, much less accepted by, Roman officials, who were consistently hostile to appeals to local laws that conflicted with Roman ones. It is argued instead that the right of redemption contained in *laesio enormis* can be traced to an ancient Mesopotamian doctrine, the right of redemption for family land and persons, that persisted and ultimately prevailed in the eastern empire.—Eds.]

The doctrine of Laesio Enormis allows a seller of land to rescind the contract if the sale price was less the half the just or true price, or gives the buyer the option of paying the difference.

For a rule that contradicts a basic premise of the classical Roman law of sale—that the price does not need to be adequate for a sale to be valid—it is based on remarkably slim foundations.[1] It is found in two sections of Codex Justinianus, *C.* 4.44.2 and *C.* 4.44.8, both rescripts attributed to Diocletian. *C.* 4.44.2 sets out the doctrine in a straightforward manner:

> If {{you or}} your father sold property worth a higher price for a lower price, it is equitable that either you get back the land sold through a court order, refunding the price to the purchasers, or, if the buyer chooses, you get back

[Originally published in *Revue Internationale des Droits de l'Antiquité* 55 (2008): 39–52. Reprinted with permission, which we gratefully acknowledge.—Eds.]

what is lacking from the just price. The price is deemed to be too low if less than half of the true price has been paid.

De rescindenda venditione. *Impp. Diocletianus et Maximianus AA. Aurelio Lupo.* Rem maioris pretii si {{tu vel}} pater tuus minoris pretii distraxit,[2] humanum est ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis vel si emptor elegerit quod deest iusto pretio recipies. minus autem pretium esse videtur si nec dimidia pars veri pretii soluta sit.[3]

C. 4.44.8, by contrast, does not expound the doctrine directly. Rather, it is a long restatement of the classical principle of free bargaining, with an unexpected qualification regarding the buyer's option at the end:

If your son sold your land with your consent, fraud must be proved due to the craft and guile of the buyer or else immediate fear of death or physical torture must be made manifest, in order for the sale to be held invalid. For the sole fact that you state that the land was sold at a slightly lower price is insufficient to rescind the purchase. Clearly if you had considered the nature of a contract of sale and the fact that the buyer approaches this contract with the wish to buy cheap and the seller to sell dear, and only after much wrangling, the seller little by little coming down from the price he sought and the buyer adding to what he offered, they agree to a definite price, you would at once see that neither good faith, which protects the agreement of the buyer and seller, allows, nor does any reason permit a contract concluded by agreement to be rescinded on this account, either at once or after dispute of the amount of the price: unless less than half of the just price prevailing at the time of sale has been paid, in which case the choice already accorded to the buyer must be maintained.

Idem AA. et CC. Aureliae Euodiae. Si voluntate tua fundum tuum filius tuus venumdedit, dolus ex calliditate atque insidiis emptoris argui debet vel metus mortis vel cruciatus corporis imminens detegi, ne habeatur rata venditio. hoc enim solum, quod paulo minori pretio fundum venumdatum significas, ad rescindendam emptionem invalidum est. quod videlicet si contractus emptionis atque venditionis cogitasses substantiam et quod emptor viliori comparandi, venditor cariori distrahendi votum gerentes ad hunc contractum accedant vixque post multas contentiones, paulatim venditore de eo quod petierat detrahente, emptore autem huic quod obtulerat addente, ad certum consentiant pretium, profecto perspiceres neque bonam fidem, quae emptionis atque venditionis conventionem tuetur, pati neque ullam rationem concedere rescindi propter hoc consensu finitum contractum vel statim vel

post pretii quantitatis disceptationem: nisi minus dimidia iusti pretii, quod fuerat tempore venditionis, datum est, electione iam emptori praestita servanda.[4]

There is no discussion of the doctrine anywhere else in classical or post-classical sources. On the contrary, Codex Theodosianus contains three rescripts reiterating in the strongest terms the classical principle that a sale cannot be rescinded merely on the grounds that the price was less than the property was worth (*C. Th.* 3.1; 4.8). In view of the doctrine's rejection in post-Diocletian law, both paragraphs have long been suspected of being Justinianic interpolations.[5] Like C. 4.44.8, three other paragraphs in Codex Justinianus show definite signs of interpolation in rescripts that originally upheld the classical position, in order to make them conform with the doctrine: *C.* 4.44.12 and 15; 4.46.2.[6]

Whichever Roman emperor was responsible for the two rescripts, it is unlikely that the doctrine was created *ex nihilo*. A concept so alien to Roman law must have come from a foreign system. The most probable source is the native legal institutions of the non-Roman inhabitants of the eastern Roman empire—what Mitteis called *Volksrecht*.[7]

Within the eastern empire, it has been suggested that *laesio enormis* derives specifically from Rabbinic law.[8] According to the doctrine of *ona'ah* (overreaching or price fraud), a contract of sale may be rescinded if the price deviates more than one-sixth from the "purchase" (*mekaḥ*), which is taken to mean the market price. The doctrine was developed by the Tannaim, rabbinic jurists of the first and second centuries C.E. According to the Mishnah (Bava Mezia):

4.3: Overreaching is four silver pieces out of the twenty-four to a *sela'*, that is, one-sixth of the purchase. Until when is one allowed to rescind? Until he (the injured party) has shown it to a merchant or to his relative (for assessment). . . .
4.4: Overreaching may be claimed by the buyer and seller alike. . . . The one who was deceived has the upper hand: if he wished, he could say, "Give me my money" or "Give me the amount by which you deceived me."
4.9: Overreaching does not apply to the following: slaves, debt-notes, land, and temple property.

As can be seen from these excerpts, the doctrine of overreaching bears some resemblance to *laesio enormis*, especially as regards the choice between rescission and payment of the difference. There are also notable differences. Overreaching works in favor of either the buyer or the seller, and the choice of

remedy is in the hands of the injured party. Most significantly, it specifically excludes land.

The situation is more complex, however, since there are many differing opinions among the Rabbis and many variations, some of which gained general acceptance and some of which did not. For example, another Tannaitic scholar, Rabbi Nathan, stated that where the discrepancy exceeded one-sixth, the contract was void, with no possibility of paying the difference (*biṭṭul mekaḥ*: Talmud Bavli, Bava Metziah 50b, 51a).

Later generations of Rabbis extended the Tannaitic doctrine, constructing an even more complex system (T. B. Bava Metzia 49a et seq.). Thus Rabbi Yohanan, who was active in the mid-third century, extended *ona'ah* to land, but only in the case of "excessive" overreaching and only with the remedy of nullity (*biṭṭul mekaḥ*. T. B. Bava Metzia 57a). While the mainstream Talmudic doctrine still does not constitute a close parallel to *laesio enormis*, various opinions put forward by individual jurists can be amalgamated to smooth out the discrepancies.[9]

This methodology begs the question of the relationship between the two legal systems. It is hardly likely that imperial Roman officials were privy to the in part highly theoretical juridical discussions of Rabbis in their eastern provinces, still less that they would have incorporated into Roman law the opinion of a particular jurist. Nor would those officials be receptive to a local petitioner who asserted a doctrine from Rabbinic law. On the contrary, they would see it as an opportunity to reaffirm the primacy of Roman law over local traditions, as in the rescripts of Diocletian above. As Selb points out in respect of the Syro-Roman Law Book, queries from the East, based on the common law conceptions of petitioners, were answered with Roman Law. Local institutions were cited in order to reject them.[10]

Sperber therefore adopts a more cautious approach, suggesting that the Rabbinic and Roman doctrines were similar reactions to a common problem in the late third century.[11] According to Sperber, the period was characterized by a collapse in land prices accompanied by severe inflation in commodities. Rabbi Yohanan (active in Roman Palestine) therefore modified the doctrine of *ona'ah* to meet the plight of poor peasant farmers forced to sell their land. In the same way, Diocletian issued rescripts designed to protect poor landowners, while at the same time seeking to curb inflation by his Edict on Maximum Prices, which does not include land.

Sperber's approach raises as many problems as it solves. The Rabbinic doctrine, however modified, still applies equally to excessively high and low prices and can with difficulty be interpreted as protecting the seller alone.

If the economic climate meant that only low prices were in issue, then it should be remembered that the rule does not apply a "just price" but the market price as its benchmark. If the market price were generally depressed, then a sale at that price would not constitute excessive deviation. A standard of excessive deviation applies by definition to an egregious individual case; it does not fit a universal economic condition.

As regards Diocletian's measures (assuming *laesio enormis* to be attributable to Diocletian, not Justinian), similar objections obtain. It is true that the "just price" of the rescripts might be some other measure than the market price. The rule of half the just price, however, where the latter is not defined, would be an extraordinarily oblique, not to say clumsy, way to deal with a universal problem. Again, it seems much more appropriate to an exceptionally bad bargain in an individual case. If Diocletian's approach to high commodity prices was to set a fixed maximum, then he would be expected to remedy low land prices in exactly the same way—with a fixed minimum. A Roman emperor had more freedom than a Rabbinic jurist, who could not abolish existing rules by legislation but was obliged to adapt them by interpretation.

In searching for a foreign origin for *laesio enormis*, we would cast the net much wider. A more broadly based tradition would have had a greater chance of success in being received into Roman law. Crone has recently defined the *Volksrecht* of the eastern Roman empire as "a well-documented set of practices shared by many or most of the inhabitants of the Near East from the Nile to the Tigris."[12] These practices constituted "a legal *koinē*, that is, a way of regulating things, usually of Greek or Near Eastern origin," which was known and understood throughout the eastern provinces.[13] Taking this insight as our starting point, we would apply it chronologically as well as geographically. We propose that the origin of *laesio enormis* lies much further back in time than the Roman Dominate, in an ancient but widespread and persistent legal tradition.

There is scattered but recurrent evidence from the ancient Near East from the third millennium up to the third century B.C.E. of a right of redemption. The right of redemption was the right of a seller, and a seller only, to buy back family land or members of the family sold into slavery under certain circumstances.

A law code from eighteenth-century Mesopotamia provides a typical example. According to Codex Eshnunna (CE) §39:

> If a man grows weak and sells his house, whenever the buyer will sell, the owner of the house may redeem.

Codex Hammurabi §119, dating to a few decades later, illustrates the same principle for persons, and provides further important details:

> If a debt seizes a man and he sells his slave woman who has borne him sons, the owner of the slave woman may pay the silver that the merchant paid and redeem his slave woman.

We learn that the price of redemption is the original sale price and that the background is debt. The phrase "grows weak" in CE §39 is in fact a technical term for indebtedness, which recurs over a millennium later in the Hebrew Bible, in a source generally dated between the sixth and fourth centuries B.C.E. According to Lev. 25:47–49:

> If a resident alien obtains means among you and your brother grows weak with him and he is sold to a resident alien or one of his descendants: after he is sold redemption is available to him—one of his brothers may redeem him or his uncle or his cousin may redeem him or a remaining member of his clan may redeem him or if he obtains the means he may redeem himself.

Lev. 25:25–26 has parallel provisions for the sale of a landed estate, somewhat complicated by additional provisions regarding automatic release of the property in the Jubilee year. Vv. 29–30 present a clearer, if more restrictive, statement of the doctrine, in particular circumstances:

> If a man sells a dwelling house in a walled city, he has the right of redemption until the close of a year from its sale; he shall have a year for redemption. If he does not redeem within a full year, the house in the walled city will pass irrevocably (*le-ṣemitut*) to its purchaser for ever. It shall not be released in the Jubilee.

Once the period for redemption has elapsed, the buyer's title is safe from both redemption and reclaim in the Jubilee year, which effected a cancellation of debts. The Hebrew term that we have translated as "irrevocably" is of great significance and will be examined further below.

As can be seen from these examples, the right of redemption exists as a principle but in practice is surrounded by conditions and restrictions in the individual legal systems. There appears to have been an underlying equitable power of governments to allow reversal of valid contracts of sale, although in practice they exercised this power sparingly. A letter from Assyrian merchants in Anatolia from the eighteenth century illustrates the *ad hoc* nature of the right.[14] The writer complains that the correspondent has allowed his late father's house to be sold due to debts and has thus failed to save the spirits of his ancestors. But now, the letter continues:

> The God Ashur has been gracious to his city: A man whose house has been sold must pay (only) half the price of his house in order to regain it. For the balance, terms of three installments have been set.

The reference is to a decree by the city council that a family house sold for debt might be redeemed for a down payment of half the original price and the balance in three installments. The measure is likely to have been retrospective, affecting only previous sales. A Babylonian sale of land from the same period is careful to note the sale took place after the king had ordered the redemption of fields and houses, after the decree of the city.[15]

The rationale behind this right of redemption lies in the conflicting nature of pledge and sale. Where a loan is secured by pledge, it is in the nature of the pledge that it be redeemable: once the loan is repaid, the pledge will return to its original owner, the debtor, and the contract will thus have been fulfilled. The purpose of sale, by contrast, is to transfer ownership in the object sold to the purchaser permanently.

If, however, the debtor defaults on the loan and the pledge is forfeited, then ownership does pass to the pledgee/creditor permanently. The effect is therefore that of a forced sale. Since in the case of capital assets, such as land and slaves, the value of the pledge will often exceed the amount of the debt, forfeiture will amount to sale at a considerable discount. The same will apply when sale at a discount is made to a third party because of pressure of debts.

The doctrine of redemption enabled a court to look at the substance of a transaction, not its form. If in substance a sale was forfeiture of a debt, whether to the benefit of the original creditor or a third party, the court would intervene to accord an outright sale the character of a pledge transaction.

The natural corollary of this doctrine was that sale at full value would not be affected. A standard clause in contracts of sale of land from Susa (eighteenth century) expresses the principle succinctly:

> Not pledge, not redemption, full price. As a father buys for his son, so X has purchased in perpetuity . . . [16]

The term "full price" (Akkadian: *šīmu gamru*) must refer to the full value of the property, although it does not tell us how that value was calculated. The phrase "as a father buys for his son" reveals that the right of redemption might be of long duration in this system, leading to the possibility that the seller or his heirs might someday challenge the title of the purchaser's heirs.

The two possible consequences of sale are illustrated by Assyrian loan contracts of the fourteenth century. There we encounter two types of pledge

of land, termed by modern scholars *Lösungspfand* and *Verfallspfand*.[17] In the first type, if the debtor fails to pay by the due date, the land becomes the property of the creditor, but the debtor nonetheless retains a right of redemption. The creditor thus has a conditional title to the property, which can be redeemed by the debtor or his heirs at a later date.

In the second, the land upon default is deemed to have been sold absolutely to the creditor, and the debtor must even ensure that a royally certified deed of sale is drafted. Thus *KAJ* 12 reads:[18]

1. Seal of X. Seal of Y.
2–7. X and Y have received 17 mina of tin by the city-hall weight from Z.
7–8. They shall repay the capital of the tin within five months.
9–12. Z will hold as security for this tin five *iku* of their good-quality land in the district of the town of Gubbe-ekalle.
13–16. If the due date passes, their land is acquired and taken; they have received the tin, the price of their land. They are paid, quit.
17–19. They shall clear the land (of claims), measure it with the king's rope and write a strong tablet before the king.
20–21. Until they write a strong tablet, this (tablet) is like a strong tablet.
22–30. (6 witnesses. Date)

It seems then, that the creditor does obtain outright purchase of the land for the price of the loan. Documents drafted at a later stage of this type of transaction, however, reveal that the creditor has to pay a considerable sum in addition to the amount of the loan. *KAJ* 150 reads:[19]

1. Seal of X (debtor).
2–7. 10 *iku* of good cultivated land in the district of the town of Gubbe-ekalle, which in a tablet of Y (creditor) were held as a pledge for 30 mina of tin with the condition "if the term expires, it (the land) is acquired and taken":[20]
8–13. He (debtor) claimed[21] the price of his land and received the balance of his tin. X has received [1?] talent 40 mina (= 100 mina), [aside from] the word of the tablet.
14–17. He shall clear [the land] of claims, measure it with the king's rope and write a strong tablet before the king.
18–26. (Witnesses, date).

The creditor's contract entitled him upon default to treat the pledge as sale. Nonetheless, in order to acquire an irredeemable title, he still had to pay the difference between the amount of the loan and the full value of the property. The debtor duly claimed and received that balance.

The doctrine is further illustrated by *KAJ* 168, which records the consequences of realizing the pledge of a slave woman as a *Verfallspfand*:[22]

> Seal of X (debtor). 4 talents, 20 mina of tin, owed by X to Y. He had received it and (now) this tin has been given to him for the price of one woman. He shall have the woman valued (*uballaṭu*) and shall claim (*išassiu*) the price of his woman. He shall receive the balance of his tin.[23]

Many *Verfallspfand* contracts specify that the property was pledged "as full satisfaction for" (*ki našlamte*) or "instead of" (*kimu*) the loan, indicating that the loan amounted to the full value of the pledge and therefore no balance would be payable by the creditor on default.[24]

References to "the full price" or simply "the price" of the property in sale documents may therefore be an indirect allusion to the existence of a right of redemption (which is being neutralized), in the appropriate context. We cannot assume that meaning in every case because "the full price" is more commonly used to indicate that the whole of the price agreed in that particular sale has been paid, which was a necessary condition for the transfer of ownership in certain categories of property such as land.[25] In a few sources, however, the special meaning of "full price" is made clear.

In sources from Ugarit, a city-state on the Syrian coast that flourished in the thirteenth and twelfth centuries, documents drafted in Akkadian that record the sale of land often contain a clause stating that the land is "alienated for ever" (*ṣamit ana/adi dārītī*) to the buyer and his children. The term translated here "alienated" (*ṣamit*) is not Akkadian but is presumably Ugaritic, a language closely related to Hebrew. It is based on the same root as the Hebrew term that we translated "irrevocably" (*le-ṣemitut*) in Lev 25:30, where redemption was barred. The term is usually spelled syllabically, but the scribes of Ugarit sometimes substituted for a syllabic spelling the Sumerian technical term "for its full price" (*šám-til-la-bi-šè*) and in one case glossed the Sumerian term with the syllabic spelling (*šám-til-la-bi-šè*: *ṣamātu*), in order to distinguish it from "full price" in the sense of "the whole price," for which the Sumerian term was used in an earlier clause in the same document.[26] The drafters of land sale documents at Ugarit thus saw payment of full value as a guarantee against redemption.

Scattered references to redemption abound in the ancient Near East, but in the form of allusions even more subtle than the above.[27] For example, Old Babylonian loan contracts sometimes contain a clause stating that "the silver is like the field," that is, valuing the pledge at the level of the loan, as with the "full satisfaction" clause in Assyrian *Verfallspfand* contracts.[28] A special type of land sale document from the Neo-Babylonian and Persian

periods (sixth–fourth centuries B.C.E.), called the *ṭuppi apilti* ("tablet of payment"), was drafted by royal scribes and, as can be discerned from the extant examples, involved the transfer of land by the debtor in lieu of payment of the debt, in contrast to the record of a true sale (called a *ṭuppi maḫīri*). It represented royal certification that in a sale, which in reality was the forfeiture of a pledge, the "price" equaled the value of the property and was thus a bar to future redemption.[29] In other words, it was the same as the "strong tablet" that the Middle Assyrian debtor/seller had to have drafted before the king in *KAJ* 12 discussed above.

We conclude that the right of redemption was a generally recognized principle in the ancient Near East that remained in existence for millennia, although for the most part the copious legal sources of the region pass over it in silence or at most refer to it indirectly. It is impossible to know how well it was honored in practice, but it represented an expectation that people had of their government, a symbol of good governance. A witness thereto is the use of redemption by the biblical prophets and later in the New Testament as a powerful theological metaphor.

Sources attesting to the doctrine of redemption disappear in the third century B.C.E. with the replacement of local scripts such as cuneiform with Greek. We suggest, however, that such a long-standing tradition did not simply perish, but that consciousness of it survived in local legal systems in the centuries following.[30]

Accordingly, the right granted to the seller in *C.* 4.44.2 represents that ancient right of redemption. Three essential elements of the ancient doctrine are apparent in the rescript.

First, in our opinion, the rescript refers to redeeming the land eventually rather than immediately rescinding the contract, as commentators generally assume. This is particularly indicated by the fact that the possibility is entertained of a son seeking to reverse a transaction by his father, presumably since deceased. Second, the right of the buyer in the alternative to acquire the land in perpetuity on payment of the difference in value is exactly the same as that allowed under the ancient doctrine as its natural corollary. Third, the concept of a "just price" is the very concept of the "full price" upon which the ancient tradition is founded. The only new element is the definition of half the true price as low enough to invoke the doctrine. The level at which the price became too low (presumably more than a trivial difference) is not discussed in the ancient Near Eastern sources. By the same token, none of those sources consider it necessary to explain what the full price is. It was regarded as self-evident, as it must have been to the inhabitants of the eastern Roman empire.[31]

Classical Roman law of sale saw land purely as a commodity, to be traded like any other item.[32] The eastern doctrine saw land as family, indeed ancestral, property, to be sheltered from the normal consequences of market forces, in particular of the harmful effects of indebtedness. Roman imperial officials would have none of it. In *C.* 4.44.12 (stripped of interpolation*) Diocletian testily responds to a petition:

> The sale of the farm must remain no less valid because you claim to have sold it pressed by necessary expenses (not*) at a cheaper price or through a pressing debt. You would act more wisely by refraining from inadmissible petitions or by seeking the price, if not paid in full.[33]

Nevertheless, the constant reiteration of the market concept of land in imperial Roman sources as grounds for rejecting petitions suggests that local petitioners were equally insistent on the family concept of land. Ultimately they prevailed.

Notes

1. The classical view is reflected in *D.* 18.1.38, 55; 19.2.22.3; see also 18.1.14. See Zimmermann 1996: 255–258.

2. We consider the addition of the petitioner in the second person as a subject of the verb to be a clumsy gloss. See de Zulueta 1945: 165.

3. The term *iustum pretium* ("just price") is familiar from classical sources as a valuation of property to be made by the praetor or judge, but in cases where it cannot be arrived at by free bargaining. For example, the praetor may set the price of a slave to be bought and freed by an heir under the terms of a *fideicommissa* (*D.* 40.5.31.4). Similarly, it represents the *aestimatio* of the value of property made by a judge in division of common property or for the value of property reclaimed, as opposed to the plaintiff's valuation by oath (*D.* 6.1.70; 10.3.10.2; 24.1.36 pr.; Lévy 1922: 534–535). The same applies to the term *verum pretium* ("true price"), e.g., *D.* 30.81.4; 40.5.32.2. The latter is used, notably, as the basis for multiple damages for theft and robbery (*D.* 47.8.2.14; 47.8.4.11).

4. The "choice already accorded to the buyer" is a reference to the earlier paragraph of the Code, showing that this phrase, and probably the whole qualifying clause, did not belong to the original rescript but is an editorial addition by the compilers of the Code. Likewise the term *paulo* ("slightly" lower price) appears to be an interpolation designed to bring the text into some sort of conformity with the doctrine. See note 6 below.

5. Already by Thomasius in 1706: see Jolowicz 1937: 47–72, esp. 52–53; Zimmermann 1996: 259–261.

6. Jolowicz 1937: 53.

7. Mitteis 1891: esp. 5–58. Although some details of his thesis have subsequently been disproved (for example, the nature of the Syro-Roman Law Book), Mitteis' overall insight remains valid.

8. Dikstein 1926: 28–29 (Hebrew). The earlier literature is summarized by Jolowicz 1937: 53–58, but see now Sperber 1973: 254–274.

9. See esp. Dikstein 1926: 32–48; cf. Sperber 1973: 262–265, who selects a mention of one-half from among various measures of excess, although R. Yohanan himself never defined "excessive" overreaching.

10. Selb 1964: 201–202.

11. Sperber 1973: 265–274.

12. Crone 1987: 92.

13. Crone 1987: 93.

14. Michel and Garelli 1997: 1 46.

15. BM 97141, edited by Veenhof 1999: 609–613.

16. See Westbrook 1985b: 97–127, esp. 102–107 and 111–115.

17. Koschaker 1928: 102–116.

18. Edited by David and Ebeling: 1929, no. 29

19. Edited in part by Koschaker 1928: 102–104. Cf. Westbrook 1985b: 117.

20. Y is the financier Iddin-Kubi, son of Rish-Nabu, the same creditor as in *KAJ* 12 above (=Z).

21. Akk. *issi*, lit. "shouted." On the meaning of this term, see note 23 below.

22. Edited in part by Veenhof 1987: 55–56.

23. Following Veenhof 1987, as to the meaning of *uballaṭu*. We disagree with earlier commentators, who have interpreted *išassiu* (lit. "shout") as a public declaration or proclamation of the price or a public auction: (Koschaker 1928: 36 n. 2 and 103; Veenhof 1987; Freydank 1991: 162–164.

24. E.g., E. A. Speiser 1939: 145–147. Cf. Abraham 2001: 184–186.

25. The question is discussed in detail in Westbrook 1985b.

26. See Westbrook 1985b: 124–126.

27. The exception is Egypt, which suffers a dearth of legal documents in general until the fifth century B.C.E., and no real abundance until the Hellenistic period.

28. Kienast 1978: 78–79, 100–102; Westbrook 2001: 70–73.

29. Westbrook 2006a: 138–144.

30. This is but one example of the continued presence of ancient Near Eastern legal traditions in the eastern Roman empire. Some fifty years ago, Taubenschlag already made pioneering attempts to find traces of cuneiform law in Roman and Byzantine sources (Taubenschlag 1953–1954, 1959a, 1959b). While some of his conclusions are still valid, his examples should be treated with caution, for two reasons. Firstly, the parallels given by Taubenschlag are isolated examples, not a stream of tradition. Secondly, the rules of cuneiform law upon which Taubenschlag based his conclusions were themselves based on what is now outdated scholarship. Further research is necessary.

31. The concept of half the true value (by *aestimatio*) is found in classical sources, but in an entirely different context, where it makes sense: where a house sold has unbeknownst to the parties been partially destroyed by fire (*D*. 18.1.57 pr.).

32. As did Rabbinic law, which (notwithstanding the doctrines discussed here) effectively jettisoned all the debt-relief measures of biblical law. Thus Hillel (first century B.C.E.) invented a device called the *prosbol* to enable creditors to circumvent the seventh-year cancellation of debts mandated by Deut. 15:1–11 (Sheb. 10.2).

33. Note the play between the full price meaning full value and meaning the whole of the agreed price—the same ambiguity that informs the Near Eastern terminology.

Codification and Canonization

Abstract
First millennium codes from the Mediterranean basin, such as the Twelve Tables and the Pentateuchal codes, were the product of an ancient proto-scientific tradition from Mesopotamia that produced treatises on the law in the form of lists of casuistic examples. Like their cuneiform forerunners, they were originally read as descriptive and not prescriptive sources of law, because the concept of the legislative text as an autonomous source of law had not yet been developed. However, the intellectual revolution that produced analytical jurisprudence and jurists also led to a change in their character. They were "canonized" by having attributed to them the status of legislation and of autonomy. They could thus be read as if they were a comprehensive and prescriptive body of rules.

Introduction

A law code has two requisites: firstly that it be a law and secondly that it be a code. The first means that the text must be a normative source of law which a court is bound to obey, not merely a source of information about the law, however much respect the court may have for its sagacity. The second requirement means that it must be an exclusive source of the law, at least in the area which it purports to regulate (e.g. civil code, criminal code). Even if some exception is made in practice, the theoretical concept remains necessary to interpretation of the code. Its text is deemed to be a comprehensive statement of the relevant law, so that anything omitted from the text is omitted from the law—a sort of legal *horror vacui*.

[Originally published in E. Lévy, ed., *La codification des lois dans l'antiquité* (Paris: De Boccard, 2000), 33–47. Reprinted with permission, which we gratefully acknowledge.—Eds.]

Early "Law Codes"

The earliest known legal systems are those of the ancient Near East, the documentary record of which stretches from the thirty-first to the third century B.C.E. Scattered through this record, and indeed extending beyond it, is a distinctive genre of texts known to modern scholars as law codes. There are seven extant examples in cuneiform script, and several more from the periphery of cuneiform culture, such as the biblical codes, the Laws of Gortyn, the Laws of Drakon, and the Twelve Tables.[1] Did these documents meet the above criteria? Let us begin with the best-known example, Codex Hammurabi.

In the epilogue to his code, king Hammurabi appears to claim both the properties of law and code for its provisions. He states:

> Any man wronged who has a case, may he . . . have read to him the inscription of my stele, may he hear my words sublime and may my stele reveal the case to him. May he see his judgment and his mind be eased. . . . (xlviii 3–19)

And a little further on:

> In the future, may any king who arises in the land keep the just words that I have written on my stele. May he not change the judgments of the land that I judged, the decisions of the land that I decided. . . . (59–72)

We should be careful, however, not to import our own cultural and juridical conceptions into the text. Let us begin with the idea of exhaustiveness that the first of the above passages appears to claim.

Exhaustive Codes?

The provisions of Codex Hammurabi are formulated as a series of casuistic sentences. This form, characteristic of all the law codes, marks it as belonging to a wider literary genre, namely, that of Mesopotamian "science." By the third millennium B.C.E., the Mesopotamians had developed a technique for organizing knowledge by compiling lists of like examples: of flora, fauna, professions, grammatical forms, etc. A more sophisticated type of list consisted of cases: medical symptoms and their diagnosis, omens and their significance, legal problems and their solution.[2] They were expressed in a hypothetical form that for the Mesopotamians was the hallmark of their scientific method: for example, "if X does Y, his punishment shall be Z."

Mesopotamian science must have been a considerable improvement on whatever system of thought had preceded it, for it came to dominate, along with other aspects of Mesopotamian civilization, the whole of the ancient Near East (with the partial exception of Egypt). The genre of casuistic law codes was one aspect of this domination, and one in which it spread even further, into the Mediterranean basin. A brief examination of the contents of the Mediterranean law codes, as opposed to native accounts of their origins, immediately reveals their dependence in form and content on jurisprudential traditions that can be traced back to Sumer of the third millennium B.C.E.[3]

Compared with classical or modern methods of organizing knowledge, however, the Mesopotamian approach was primitive, a proto-science. In particular, it lacked the ability to formulate general principles or abstract categories. Hence it was unable to reason vertically; it could only proceed horizontally by cumulating examples. Accordingly, neither Codex Hammurabi nor its fellow codes could ever amount to a comprehensive statement of the law; their lists of casuistic examples could not hope to be exhaustive, except at the point of infinity.

How then, could Hammurabi purport to provide every possible answer to the perplexed litigant? He felt perfectly justified in his claim, because his scientific standards were very different from our own. Certain methods were employed by Mesopotamian science to compensate for its own limitations, so that, in native eyes at least, its lists met the requirements of comprehensiveness. The examples were consciously grouped by topic, as we know from a native edition of Codex Hammurabi, which gives sub-headings to groups of paragraphs, such as "Rules of House, Field, and Orchard," "Rules of Soldier and Fisherman" (types of feudal tenant).[4] Note that the headings themselves are not strictly analytical, but list examples. Within topics, the choice and arrangement of examples was designed to place markers at suggestive points—sometimes at the very center of the topic but most often at its periphery—so as to indicate (if not to delineate) its boundaries.[5]

A good example of this technique is to be found in the opening paragraphs of Codex Hammurabi itself:

> If a man accuses a man of murder and does not prove it, his accuser shall be killed.
>
> If a man accuses a man of witchcraft and does not prove it, the one accused of witchcraft shall go to the river and leap the river. If the river overcomes him, his accuser shall take his house; if the river purifies that man

and he is saved, the one who accused him of witchcraft shall be killed and the one who leapt the river shall take the house of his accuser.

If a man in a lawsuit proffered false testimony and did not prove what he said, if that case is a capital case, that man shall be killed.

If he proffered testimony on grain or silver, he shall bear the penalty of that case.

If a judge judges a case, renders a verdict, and has a sealed document drafted, and subsequently changes his verdict, they shall prove that judge to have changed his verdict and he shall pay 12-fold the claim in that case. . . .

The topic is clearly procedure in litigation. The five paragraphs cover the topic by the simple technique of chronological sequence: initial claim, trial, judgment. At each stage examples are given which illustrate misconduct, some common, others not so. Although only a small sample of possible wrongdoing and of types of claim is given, the parameters of the topic are set and the principles by which other cases within its ambit will be decided are at least adumbrated, if not expressed.

There is thus a considerable gap between the subjective perceptions of the ancient authors as to the exhaustive nature of their work and our evaluation according to modern criteria. It is in the light of this gap that the second passage from Hammurabi's epilogue, referring to his code as a text to be obeyed by future kings, should be considered.

Normative Legislation

There has been much debate as to whether the ancient Near Eastern law codes were normative legislation at all.[6] It has been noted that they are never cited in the manner of modern laws, but that argument has been dismissed as an argument from silence.[7] A second argument arises from the "scientific" character of the texts. A scientific work is a work of reference: it may be consulted, but it does not stipulate, as does a law. Again, it may be countered that although the ancient law codes were the product of science, they became legislation by virtue of their publication by a king. I wish to raise a third, more radical, argument against the legislative character of the ancient codes. It relates not to the way they were *written* but to the way that they, and all other legal documents, were *read*. In my view, Mesopotamian jurisprudence did not read legal texts in the same way as we do. They did not treat them as autonomous sources.

Legal Interpretation and Textual Autonomy

A vital element in the status of modern legislation is that the words of the text are the ultimate point of reference for its meaning. They can be elucidated with the assistance of *travaux preparatoires* or other evidence of the will of the lawgiver, but the lawgiver could never simply declare, for example, that the text did not properly reproduce his intention and should be disregarded. The reason is that the text is not mere evidence of the order of the lawgiver; once promulgated, it becomes the lawgiver itself, the messenger as well as the message. Consequently, specially trained experts are needed to "read" its provisions correctly and understand its words, to introduce that much-maligned practice of *legalistic* interpretation.

In the ancient Near East, lawyers did not yet exist as a learned profession.[8] This curious absence may be explained in part by the fact that the conceptual basis for their discipline was still lacking. Those same inadequacies of Mesopotamian science that shaped the composition of their law codes also circumscribed their reading of legal texts. In particular, one inadequacy not yet mentioned, namely, the inability to *define* concepts, was of vital significance. One of the key instruments of *legal* interpretation of texts—definition—was not available to them. More significant, however, was the status of legal texts themselves within the constitutional structure of ancient states: they had not yet attained sufficient autonomy to require a special discipline for their interpretation.

Let us begin with those documents about the status of which we can be relatively certain. It is well established that private legal documents such as contracts and testaments were of evidentiary value only: they were the protocol of an oral transaction.[9] Even the most sophisticated of contractual documents, international treaties, were no more than records of an oral oath ceremony, and their drafting was a triumph of the scribe's, not the lawyer's, art.

The same may even have been true of records of unquestionably legislative acts. There is plenty of evidence in letters and contracts of rulers making orders and of courts obeying them. But those orders, even when committed to writing, did not stray far from their author, either in scope or duration. Decrees of kings did not set up general rules of permanent validity affecting the general population, that is, rules of the type found in the law codes. The reason for this is that they could not establish for themselves an existence that would outlive the king's own will. Ultimately, cases would be referred back to the king, not to the decree. Thus the most sophisticated

example of ancient Near Eastern legislation, the royal debt-release decree, which was solemnly proclaimed, affected the whole population, and was recorded in a lengthy text, was retrospective. It demonstrated the king's ability to impose his will on past acts. Subject to the restraints of justice, there was no guarantee that an order of the king relating to the future would not be replaced by a contrary order relating to the past, so undoing all that had been done by the first. In these circumstances, the written text could not be more than evidence of the king's order; it never became independent of that order.

Between these two types of legal source lie the "law codes." Their structure made no pretense of being anything but an academic treatise, the context of their publication, in those texts that provide one, was an *apologia,* and nothing in letters or contracts refers to their being obeyed.[10] It is unlikely, therefore, that their text would have had an independent status.

As was the case with comprehensiveness, the limits of Mesopotamian conceptualization provide the cultural context for understanding Hammurabi's claims. Hammurabi expected future kings to follow the words on his stele because they were evidence of his wise judgments, which resolved every case that could possibly exist, not because the stele was law independent of Hammurabi. On the contrary, the same curses that were heaped upon wicked future kings for erasing the words of the stele applied to a king who merely erased the *name* of Hammurabi and substituted his own.[11]

If this understanding is correct, the reason for the striking absence of all reference in the ancient Near Eastern sources to citation of the law codes in law courts is not the existence of some oral practice which has not happened to surface in the extant written sources (a perfectly feasible possibility), but a fundamental lack of the necessary conceptual basis: legalism.

The total absence of legalism, being a negative proposition, is impossible to prove and, whatever its heuristic value, may be too extreme. It is possible that, as with other areas of theoretical reasoning, the Mesopotamians had some inkling of a text's potential for semantic manipulation, but failed to develop it.[12] A search of the cuneiform sources—not merely the legal ones—for evidence of legalistic reasoning brings to light some straws in the wind. From the early second millennium B.C.E., there are a few references in Babylonian contracts and in Assyrian letters and court verdicts to actions to be taken "in accordance with the words of the stele." The city council of Assur in particular uses this formula to refer to what appear to be orders previously made by it.[13] Nonetheless, the words themselves are never given, and are never the subject of dispute. It is impossible to determine from the bare formula whether the written text was anything more than a means of disseminating information.

The copious literature relating to omens might be expected to have provided a focus for legalistic reasoning. The omen lists bear a close formal resemblance to the law codes, they apply the same scientific method, and they are analogous to judgments in the sense that they are predictions by divine rulers as to future events within their control. Furthermore, since gods are eternal, an omen will remain valid forever, that is, the same ominous sign will always have the same significance. Thus it has the potential for becoming independent of the god whose will it represents. In the seventh century, Assyrian kings consulted experts who in turn consulted canonical lists in order to establish the ominous significance of astronomical or other phenomena. Nonetheless, the closest that the experts came to interpreting the lists as independent sources was to suggest that omens predicting defeat in battle applied to an enemy land rather than the Assyrian king. Even here they showed a lack of confidence, advising the king to take apotropaic measures, as if the god could not be relied upon to follow the diviner's interpretation.[14]

There is, however, one definite reference to the power of the written word. King Esarhaddon wished to rebuild Babylon, destroyed by his father, Sennacherib. He tells us: "He (the god Marduk) wrote the time of its lying waste as 70 years, but quickly merciful Marduk's heart calmed down and he turned it upside down and ordered its rebuilding within 11 years."[15] Although represented as the god changing his mind, it appears to be an allusion to the Assyrian king turning the tablet round so that the same signs read 10+1 instead of 60+10. If so, the text was regarded as an immutable expression of the god's order, and could therefore be reinterpreted, albeit in a crude and mechanical fashion.

New Developments

The Assyrian system of the seventh century B.C.E. represents the ultimate refinement of Mesopotamian science. Although in its final stages it drew close to the creation of analytical categories, it failed to attain them, and thus failed to provide the basis for analytical jurisprudence.[16] From the Mediterranean littoral, on the other hand, new ideas were emerging that gave exciting possibilities for the development of law.

Firstly, legislation became detached from the legislator. In the book of Deuteronomy (generally dated to the seventh century), the ultimate prerogative of the king, to decree a cancellation of debts, is made automatic and cyclical (15:1–11). The tradition that Solon, after proclaiming such a decree, precluded himself from doing so again by abolishing debt-slavery, belongs

to the same trend.[17] The process of detachment was perfected in the Greek cities, where it went hand in hand with the development of new forms of government. It has been argued that the change in terminology from *thesmos* (the decree of an individual ruler) to *nomos,* which by the fourth century meant written statute, marks the change to a democratic attitude.[18] By then it had become standard practice in Athenian courts for judges and juries to swear an oath to decide according to the *nomoi,* referring to the written texts invoked before them by forensic orators (Demosthenes, *Against Timocrates* 149–151). What gave the *nomoi* their status was not their publication by or association with a ruler, but their validation by passage through a legitimate political process.

In this way, the text of legislation came to be regarded as having a life of its own, independent of the human agent who had produced it. Accordingly, Socrates could imagine the personified laws (*nomoi*) asking him, "Are you not intending by what you are trying to do (that is, escape from custody) to destroy us, the laws . . . ?" (*Crito* 50a–b). The book of Daniel (written in the second century B.C.E.) dramatically projects this new attitude back into the Near East with its description of king Darius' decree, which, "according to the law of the Medes and Persians," once written down might not be changed, even by the king himself (*Dan.* 6:9).

The second, interrelated, development was that Greek philosophy provided the means whereby truly comprehensive laws might be formulated. New methods of analytical reasoning such as division into categories (*diairesis and merismos*) and definition (*logos tēs ousias*) enabled laws to be formulated in a vertical manner, with subsidiary rules being derived from general principles, and categorization ensuring that those principles covered the whole of a given field of law.

Canonization

If the promise of such new methods was not immediately fulfilled, it was because they did not fall upon a vacuum. The societies of the Mediterranean basin not only had a long and settled tradition as regards their substantive law, they also had an equally venerable tradition as regards its theoretical formulation. It looked to a fund of casuistic wisdom, compiled by the methods of Mesopotamian science. Local versions drew in varying measure upon a repertoire of traditional legal problems developed originally by Mesopotamian jurisprudence, for instance the goring ox, the adulteress caught *in flagranti*, the thief breaking in by night, the talionic response to physical injuries.[19] In some cases parts of this casuistic fund of traditional

wisdom existed in written form. The latter, none other than the ancient law "codes," enjoyed great prestige and in some instances may have been regarded as comprehensive, by the less exacting standards of Mesopotamian science. Traditional law, especially if concretized in a law code, could not be swept aside; it could only be reformed and reformulated piecemeal.

The task fell not to philosophers, but to an entirely new learned profession—the jurists. By applying the methods of Greek philosophy, they were able to read old sources "legalistically" and thus turn them into comprehensive legislation. Their approach was therefore to "canonize" existing texts, that is, to read them as if they were law codes created on the basis of the new legal science. For this purpose, the old code would be given the status of *normative legislation* and a suitable historical pedigree, namely, promulgation at a critical juncture in the early history of the nation (not at the very beginning, but at the politically appropriate beginning).

Two parallel examples are the Pentateuch and the Twelve Tables. In the first case, several codes, or more probably fragments of codes or of an oral canon, were inserted into an historical narrative which located its promulgation at a convocation in the desert prior to Israel's occupation of the promised land, by no less than God himself.[20] Rabbinic jurists went further by deeming it the basis of all Jewish law (while admitting the existence of an oral code alongside it). In the second case, the Twelve Tables were referred to by classical jurists simply as *lex,* "the statute," and (while admitting the existence of an oral tradition) were regarded as the "*fons omnis publici privatique iuris*" ("the origin of all public and private law," Livy 3.34). The code was said to have been promulgated at a suitably critical moment in the early Republic (not during the monarchy, of course) for a suitably worthy social cause. Its form and content, it is to be noted, give no hint of any of this; they mark the code as a typical product of Mesopotamian science, in the same peripheral tradition as the biblical codes and Codex Eshnunna.

Being regarded as comprehensive legislation, the casuistic paragraphs of the old codes were interpreted as if they had been drafted by a philosopher. Cicero, who spans the two worlds of philosopher and jurist, unwittingly provides us with an insight into the jurists' attitude when he tries to explain how Greek philosophical discourse may be used for legal argumentation. The examples that he adduces to illustrate *genus* and *forma* (=species), *divisio (=diairesis), partitio* (=*merismos),* and *definitio* are not from some current juristic treatise or recent legislation, where their influence might be expected to be at its most compelling, but from that (already in Cicero's day) venerable antiquity, the Twelve Tables.[21]

Too little has been preserved of the text of the Twelve Tables for it to furnish a reliable control of the reverse process, namely, extrapolation from casuistic examples to general categories. The parallel Jewish sources, on the other hand, preserve the full text of both the original "code" and its reinterpretation at the hands of the jurists. For example, the so-called "Covenant Code" in Exod. 21–22 contains four different cases of wrongful damage scattered through its provisions: a goring ox, an ox or ass that falls into a pit, cattle that trespass on a neighbor's field, and a fire that spreads to a neighbor's field. In the hands of the Rabbinic jurists these were transformed into a code of the law of wrongful damage:

> The four heads of damage are: the ox and the pit and the devourer and the fire. *The* ox is not like the devourer, and the devourer is not like the ox, nor are both these, which are living, like the fire, which is not living. Nor are all these, whose nature is to go forth and cause damage, like the pit, whose nature is not to go forth and cause damage. What is the same in them is that their nature is to cause damage and that you are responsible for guarding them, and when they cause damage, the one who caused it is liable to pay compensation with the best of his land. (*Mishna, Baba Kamma* 1,1)

Individual cases thus became *genera,* under which other traditional cases could be classified as if they were subsidiary rules. In the light of this example, one should perhaps be cautious in assuming that rigid bi-polar distinctions of classical Roman law, such as that between *furtum manifestum* and *furtum nec manifestum,* existed in the same form in the Twelve Tables, and thus be wary of reconstructions based on that assumption.[22] If the fragmentary reference in the Twelve Tables to theft *quod nec manifestum erit*[23] was no more than an isolated allusion to a special set of circumstances, then the classical assumption that it was already then an exclusive category to which two-fold damages always applied might also be questionable.[24]

Once a casuistic rule is regarded as theoretically comprehensive, so that what is omitted is deemed to be excluded, the door is opened to extremely creative readings of the text, which were, indeed, an inevitable consequence of canonization. For the orgy of legalism that characterizes the writings of both the Rabbinical and Roman jurists may be traced to a method that on the one hand reveres the text as the most just lawgiver of all, and on the other strives to make an inadequate text cover (in theory) every possible contingency. Thus, for example, the casuistic rule in the Twelve Tables: "If a father sells a son three times, the son is free of the father" was interpreted by the classical jurists as follows:

> Now a son passes out of parental authority by three mancipations, but all other children, male or female, leave it by a single mancipation. For the law of the Twelve Tables speaks of three mancipations only in the case of a son. . . . (Gaius *Inst.* I. 132)

The jurists, faced with the practical problems of their own day, adopted a teleological rather than an historical interpretation of the canonized text. The alternative—to rewrite the text itself on the basis of the same principles that were applied to its interpretation—was not attempted. Nonetheless, the intellectual investment arising from canonization may be regarded as an important stepping-stone toward Justinian's *Digest* and subsequent codifications. It allowed the early jurists an opportunity to control the practical consequences of adopting general principles, by confining them within a framework of pragmatically tested casuistic rules.

Conclusions

We have attempted to trace the history of a legal tradition from Mesopotamia of the third millennium to the Roman Empire of the early centuries of the common era. It is a tale of both continuity and caesura. In the course of the odyssey, awareness of the system of thought with which the tradition originated—Mesopotamian legal science—was lost, as indeed was the whole civilization, lying forgotten for nearly two thousand years.

The process of canonization enabled a few products of that system of thought to survive, from societies on the periphery of its sphere of influence. While canonization served working legal systems well, at the same time it threw a veil over the original meaning of the texts, which were henceforth seen exclusively through the perspective of a radically different conceptual structure. The very success of canonization in this regard demonstrates that codification may be as much a function of reading texts as of their composition.

Notes

1. The cuneiform codes were: Codex Ur-Namma (Sumerian, c. 2100 B.C.E.) ; Codex Lipit-Ishtar (Sumerian, c. 1930); Codex Eshnunna (Akkadian, c. 1770); Codex Hammurabi (Akkadian, c. 1750); Middle Assyrian Laws (Akkadian, fourteenth century); Hittite Laws (Hittite, various copies from seventeenth to twelfth century); Neo-Babylonian Laws (Akkadian, seventh century). The Pentateuch was regarded by Rabbinical tradition as containing 613 laws, comprising both religious prescriptions and temporal rules. Modern scholars refer to the two main clusters of rules in the narrative as the Covenant Code (Exod. 21.22–23.33,

esp. chapters 21–22, where laws on temporal matters are concentrated) and the Deuteronomic Code (temporal laws concentrated mostly in chapter 15 and chapters 21–25). The Deuteronomic Code is generally dated to the seventh century B.C.E. and the Covenant Code two or three centuries earlier.

2. See Bottéro 1982.

3. See, e.g., Westbrook 1988a.

4. Ed. Finkelstein 1967.

5. Cf. Eichler 1987.

6. For a recent summary of the arguments, see Renger 1994.

7. Renger 1994: 35.

8. The correspondence of scholars with Assyrian kings of the seventh century B.C.E. names five scholarly disciplines : *fupsarru* "astrologer/scribe," *baru* "haruspex/diviner," *BSipu* "exorcist/magician," *asti* "physician," and *kalu* "lamentation chanter" (Parpola 1993: xiii–xiv).

9. Already pointed out by San Nicolò 1931: 162–163.

10. On the law codes as royal apologia, see Finkelstein 1961: 103–104.

11. "If that man pays no heed to my words which I wrote on my stele, disregards my curses, does not fear the curses of the gods, and annuls the judgments that I judged, replaces my words, removes my engraved image, erases my inscribed name and writes in his name . . ." (col. xlix 18–35).

12. See Neugebauer 1969: 29–52.

13. For references, see Veenhof 1995.

14. E.g., Parpola 1983: 14–18: "If Jupiter becomes visible in the path of the Anu stars: the crown prince will rebel against his father and seize the throne. The path of the Anu stars (means) Elam; it pertains to Elam. Nevertheless, they should (strengthen) the guard and perform the relevant apotropaic ritual." Some hint of legalistic interpretation might also lie in the question and answer concerning another omen: "Does (the omen) '(If something) passes between the legs of a man' apply to something that came out from underneath a chariot? It does apply."

15. Borger 1956: 15 no. 10.

16. A Neo-Assyrian learned commentary on extispicy, Multabiltu, finally expresses the rules of association between physical conditions of the entrails and their application to human life. It consists of three columns which read: "If length/fulfillment/(casuistic example); If protrusion/fame/(example); If thickness/strength/(example) . . ." See Jeyes 1980: 23–24.

17. Plutarch, *Solon* 15.3.

18. Ostwald 1969: 158–160; MacDowell 1978: 44.

19. See Westbrook 1988a: 91–118.

20. Cf. the legend reported by Aristotle that Locrian law was first codified by Zaleucus, who received the laws from Athena (Frag. 548 Rose).

21. *Topica,* esp. 2,9–10; 3,13–14; 4,26–28. The formal application of the Greek classifications by Roman jurists has been studied by Nörr 1972: 1–25. Cf. Mélèze-Modrzejewski 1993.

22. E.g., the putative law "*si furtum manifestum est, ni pacit, verberato transque dato . . .*" based on no reported source and offered with all due reserve by the editors in *Roman Statutes* (Crawford 1996: 578, I, 19).

23. VIII 16 (FIRA) = I, 21 in *Roman Statutes*.

24. The danger of anachronism applies *a fortiori* to reconstructions of broad statements of principle, such as that proposed by Watson for this fragment (1991: 309–312).

Reflections on the Law of Homicide in the Ancient World

Abstract

[Taking as a starting point the work of Pamela Barmash on ancient Near Eastern laws on homicide, this article uses the compendium of sources she provides as a basis for observations on issues of translation and methodology. These include the correct interpretation of the phrase usually rendered as "son of a man"; the relationship between revenge and ransom, ransom and pollution, exile and asylum; and the complex role of talio in Near Eastern and biblical laws of homicide. Finally, these texts provide a way to approach the question of the transition from self-help to enforcement of homicide law by the state. In dealing with several of these issues, it is useful to include in the analysis pertinent early Greek (not least Homeric) and Roman evidence: ancient Near Eastern and Greco-Roman cases shed light on each other and confirm proposed interpretations.—Eds.]

The task of reconstructing ancient homicide law is fraught with difficulties. In contrast to the abundance of documentation on property and commercial law, or family law, the sources are few, scattered, and often enigmatic, leaving it difficult to build up a coherent picture of ancient conceptions and systems.

A recent study by Pamela Barmash of the ancient Near Eastern laws on homicide, in attempting to reconstruct their conceptual basis, sharply distinguishes biblical from cuneiform law.[1] The author identifies three areas of difference:

[Originally published in *Maarav* 13 (2006): 143–147, 152–173. Reprinted with permission, which we gratefully acknowledge.—Eds.]

1. In biblical law, primary responsibility for remedying homicide lay with the victim's family. It was a process of self-redress or blood feud, within bounds set by legal rules. In Mesopotamia, primary responsibility rested with the state, with the victim's family only playing a subsidiary role in realizing their legal claim. The reason for the contrast in approaches lies in social, political, and economic differences: Mesopotamia was an urban society controlled by a centralized bureaucracy, whereas Israel was a rural society based on kinship ties, namely, family and lineage (*mšpīh*). Authority was local, with the monarchy having little impact. Under Mesopotamia the author includes sources from Anatolia and Syria, but makes a partial exception for Assyria, which posits a role for the killer's community and the victim's family.
2. In biblical law, homicide caused moral pollution of the whole community, whereas in cuneiform law it caused pollution of the parties involved, at most.
3. In biblical law, execution of the killer was seen as an application of *lex talionis*, whereas in cuneiform law identity between the punishment and the offense is coincidental. Homicide was just one of many serious offenses punishable with death.

In emphasizing the exceptionalism of the biblical system, Barmash follows and reinforces a long tradition of biblical scholarship. To demonstrate the differences between the systems, she examines carefully the evidence from the cuneiform sources. She goes far beyond references to the usual paragraphs of the law codes, citing letters, contracts, and other genres of cuneiform literature that are germane to homicide and providing a full transliteration and translation of the documents in question. The author has done a great service in bringing together the principal cuneiform sources on homicide in a form that makes them accessible to a much wider readership. It is also a great responsibility, since the translations are likely to become a source book in their own right, and as such will be cited uncritically by non-specialists.

The purpose of this article is not to review the author's thesis directly but to use the convenient assemblage of translated sources as a vehicle for observations on issues of translation and methodology and to take the author's analysis as a starting point for further reflections on the ancient law of homicide.

I would first like to deal with two cases where the author has followed conventional wisdom in the matter of translation of cuneiform texts. Conventional wisdom, I will suggest, has led her astray and will lead astray any reader in the future who relies on this work as a source book.

1. Sons and Gentlemen

The Akkadian terms *mār awīlim* and *mārat awīlim* literally mean "son of a man" and "daughter of a man." The term *awīlum* itself can mean just somebody, but may have a particular nuance when contrasted with another status. If contrasted with a commoner (*muškēnum*) it means a gentleman; if with a slave, a free man. Because anyone born of a gentlemen or a free man acquires thereby the same status, *mār awīlim* may sometimes also be used to denote a gentleman or a free man. (Henceforth, my remarks as to *mār awīlim* apply equally to *mārat awīlim* unless otherwise stated. They will also apply to *mār/mārat muškēnim*.)[2]

The term is found in letters and other private documents in this social sense. A Mari letter, ARM 6:40, calls for a decision as to whether a man is a slave of the palace (*warad ekallim*) or a free man (*mār awīlim*). In *AbB* 3 33, a man writes to another that their relationship is strained due to the latter's thought: "I am a gentleman; he is a commoner" (*anāku mār awīlim šu mār mušknim*). Note, however, that the same idea could be put across by translating "I am the son of a gentleman, etc." because it is birth that makes the difference. For this reason F. R. Kraus translated "ich bin ein gebürtiger *awīlum*. . . ."[3] The significance of birth is likewise at play in *AbB* 6 80, where it is proved that "a free woman, a citizen of Idamaraz" (*awīltum mārat Idamaraz*) who had been taken prisoner and enslaved is in fact "the daughter of a free man" (*mārat awīlim*). In *CT* 4 42a a slave is adopted as a son and thereby freed. If he dissolves the adoption, he will suffer "the penalty of the sons of free men" (*aran mārū awīlī*). Although it refers to the class of free men, the term "son" is particularly appropriate, since it is as a son that he is being penalized.

Accordingly, it has been the practice of translators of the Mesopotamian law codes to translate *mār awīlim,* not literally, but "free man" or "gentleman" or simply "man" where they consider the context justifies it. Already D. H. von Müller made the distinction, translating "eines anderen" (LH 196) and "Freigeborener" (203, 205, 207, 251), or "Freigeborene" for *mārat awīlim* (209) but also "die Tochter eines [freien Mannes]" (175–176).[4]

The decision as to which context justifies a departure from the literal translation is not self-evident. It has led to a rich variety of choices, somewhat clouded by doubts and hesitations. Among translators of LH, M. Roth follows von Müller by and large but in 175–176 prefers "a woman of the *awīlu*-class."[5] In 116 she translates, like most other interpreters "a man's son" but adds in a footnote "Or:. . . a member of the *awīlu*-class." R. Borger, in an attempt to be systematic and at the same time cautious, on the

one hand translates *mār awīlim* as "Bürger" in most of the above instances but with the footnote "Wörtlich: Sohn eines Bürgers" and on the other hand decides on "Tochter eines Bürgers" for *mārat awīlim*, but in 209 with the footnote "Oder: eine Bürgerin."[6] Even A. Finet, who opts for the literal translation in most paragraphs of LH, prefers "homme libre" in 196 and, taking the other extreme, "enfant d'homme libre" in 207 (although he concedes in a footnote that it could be simply "fils").[7]

Two legal historians have tried to provide a rationale for their choice of translation. G. R. Driver and J. Miles claim: "In the Laws *awīlum* when used alone never indicates a person's status. Accordingly an *awīlum* has to be described as a *mār awīlim* if his status is in question."[8] This reasoning is difficult to follow when contrasting LH 202 and 203: in the former, an *awīlum* slaps an *awīlum* "who is greater than him" while in the latter, a *mār awīlim* slaps a *mār awīlim* "who is his equal." There seems to be absolutely no rationale for the switch from one form to the other, and certainly not by Driver and Miles' system.

R. Yaron has a three-fold division that encompasses LE as well as LH: *mār/mārat awīlim* refers to either (a) a state of dependence or minority (LE 16, 26, 27), or (b) a designation of status (LH 196, 203, 205, 207, 209), or (c) "(free) man/woman" (LE 17, 33, 47A, 58).[9] Yaron discerns, however, that these distinctions still do not provide a rationale for the extended use of *mār awīlim* in options (b) and (c), where the same can be expressed by the simple form *awīlum*. He concludes: "These variations in the import of *mār/mārat awīlim* within CH (and to a lesser extent within LE) allow us to say, without being unfair, that consistent terminology does not seem to have been a major concern of their draftsmen. In their defence it may be pointed out that their looseness of language need not have caused real difficulties. . . ."

In my view looseness of language does cause real difficulties. Notwithstanding a century of scholarly consensus, I would argue that *mār awīlim* in the law codes has to be translated consistently as "son of a man" throughout. I would offer the following grounds:

1. If *mār awīlim* can mean the same as *awīlum*, then the distinction between them is pointless and the choice of expression in any given paragraph of the law code an arbitrary whim of the scribe. The ancient scribes should be credited with more intelligence: the law codes are deliberate in their use of terminology.
2. There are no paragraphs in the law codes where the term absolutely must mean a member of a class or simply free man, however intuitive it might seem to the modern translator to adopt those

interpretations. On the other hand, there are several paragraphs where it can only mean "son." Two legal doctrines are decisive:
a) Distraint (*nipûtum*) is a means of self-help by creditors whereby they imprison members of the debtor's family in order to put pressure on him to repay the debt. LE 24 describes the use of this weapon on the debtor's wife or his son, called *aššat muškēnim* and *mār muškēnim,* respectively.
b) The doctrine of vicarious talio requires that the same subordinate member of household be killed as was killed by the culprit: e.g., a son for a son. LH 116 applies this doctrine to distraint which has resulted in the death of the debtor's son (*mār awīlim*) by ordering the death of the creditor's son.

3. The status of son was immensely important in Mesopotamian law and society, far more than in modern society. For us the status conjures up images of a minor. This was not so in Mesopotamia and certainly not in the law codes: in LH a special designation is needed to show that a minor is meant (14: *mār awīlim ṣiḫram*). The vital distinction was between a person who headed an independent household and one who was a subordinate member of a household. The former was the archetypal man, while the latter remained a son, usually until the death of his father and the division of the paternal estate, which could be well into adulthood. For a daughter, the condition lasted until marriage, and sometimes thereafter, if her husband was still a subordinate member of household.
4. Sons and slaves are often grouped together as the subject of laws, precisely because they are both subordinate members of the household. Neither a son who has not yet divided his inheritance (*mār awīlim la zīzu*) nor a slave may receive credit (LE 16). Purchase of goods from a son (*mār awīlim*) or slave without proper formalities is deemed theft (LH 7).
5. At the same time, the most common sequence of variants used in the jurisprudential technique of the law codes is: man, son, slave. For example, in LH 229–231, the victims of the negligent builder are householder (death of builder), son (death of builder's son), slave (replacement). It therefore made a great deal of difference whether the victim was a man or a son. This difference accounts for the apparently unmotivated changes in the victim elsewhere. In LH 250 and 251 there seems no point to the switch from *awīlum* to *mār awīlim* as victim of the goring ox if both mean "free man" or "member of the *awīlum*-class," but the terminology makes perfect

sense once it is realized that the sequence of victims in 250–252 are: man, son, slave.

Even where the whole sequence is not found, it remains in the background as the matrix upon which rules are set and variations played. In LH 196 designation of the victim as a *mār awīlim* seems unmotivated, and is translated almost universally by "man" without even a nod to the question of class. The motivation in fact derives from another organizational technique, a mnemonic device that provides a bridge between the previous set of rules concerning parents and children and the present set of rules concerning physical injury. 195 deals with a son who strikes his father; 196 continues the theme of son with one whose eye is knocked out.[10]

The kind of inaccuracy that can enter a commentary by following the conventional interpretation of *mār awīlim* and analogous terms is illustrated by the author's discussion of distraint (p. 137 [see n. 1 above]). She translates LE 24 "If he had no claim against him yet distrained the wife of a commoner/dependent or the son of a commoner/dependent. . . ." In the following commentary, however, she states that "LE 24 treats the detention of a member of the *muškēnu* class."

The inaccuracy in this case is not fatal, as the author makes it clear that the law is discussing a member of the debtor's family. It becomes more serious when the author unwittingly demonstrates the contradictions of the traditional palette of meanings by juxtaposing LH 116 with LH 209–210: "If the free man kills a free man's son while detaining him for distraint, his son is to be killed (LH 116). If he strikes and kills a woman of the free class, his daughter is to be killed" (p. 169, cf. p. 133). The Akkadian term in 209–210, however, is *mārat awīlim* and it must mean "daughter of a man" because as in LH 116, it applies the doctrine of vicarious talio, this time the death of a pregnant woman from a miscarriage provoked by a blow. The author's translation "a woman of the free class" is all the more anomalous because she earlier translated the Sumerian equivalent (dumu.SAL lú) in two Sumerian laws on miscarriage "daughter of a man."[11]

While the above anomalies might still be dismissed as peripheral to the author's discourse, in a further instance reliance on a misleading translation of the phrase "daughter of a man" directly affects its content. It leads the author to assume a contradiction in MAL where there is none. She wonders at the different remedies for causing a miscarriage between MAL A 21 and 50, the one based on the woman's status in the free class and the other on her maternal status (p. 165). The contradiction exists only because she

translates *mārat a'īli* in 21 "a woman of the *a'īlu* class." In fact, in 21 the victim is simply the daughter of a man, while in 50 she is the wife of a man—a distinction of status which may seem irrelevant to modern eyes but which was not made lightly in Mesopotamian jurisprudence.[12]

2. Merchants and Fugitives

CTH 172 is a letter from king Hattusili III of Hatti to king Kadashman-Enlil of Babylonia. It contains a section relating to murder that has been edited and translated by several scholars.[13] In spite of gaps in the text, there is general agreement on its interpretation, which the author follows in her translation (p. 110):

> 15–17. Since you wrote to me as follows: "My merchants are being killed in the land of Amurru, the land of Ugarit, [and the land of . . .]." They do not kill [as punishment] in Hatti . . . they kill.
> 17–18. If the king hears about it, [they investigate] that matter. They arrest the killer and deliver him to the brothers of the slain man.
> 19. If his brothers accept the silver as compensatory payment, [they allow] the killer [to go free].
> 20. The place in which the homicide occurred is purified.
> 20–22. If his brothers do not accept the silver as the compensatory payment, they may make the killer [their slave].
> 22–24. If a man who has committed an offense against the king escapes to another land, killing him is not permitted. Inquire, my brother, and they shall tell you thus. Now, if they do not kill an offender [against the king], would they kill a merchant?
> 25–26. [But in regard to] the Subareans, how am I to know if they are killing people? Now send me the brothers of the dead merchants so that I can investigate their lawsuit.

The format of the translation uses square brackets indiscriminately for restorations of broken text and interpretative additions. In particular, "[as punishment]" belongs to the latter category. It follows Klengel's understanding of the text as explaining to the Babylonian king that there is no capital punishment for murderers in Hatti. Instead, a payment is required, as attested in the treaties and international correspondence from Ugarit, with the alternative being at worst enslavement of the culprit.[14]

Unfortunately, this interpretation fails to produce a coherent narrative. On the contrary, the analogy proposed by the Hittite king results in a

complete non-sequitur. It has led a recent commentator, in following the standard interpretation, to despair of Hittite powers of reasoning.[15]

I would question rather the whole premise of the accepted interpretation. Let us begin with line 23, which reads literally: "Those who do not kill an offender, would they kill a merchant?" If the first clause refers to execution as part of a judicial process, then the analogy with the merchants made by the second clause collapses. The merchants have not been charged with any crime and are in no danger of being executed; they are the victims of a crime. The letter is addressing a perennial problem of international trade: traveling merchants were vulnerable to attacks by bandits. Those who execute criminals cannot be the same people who murder merchants, as the syntax of the sentence demands.

If the analogy with merchants does not work, then the basis of the analogy, the treatment of offenders, needs to be reexamined. Lines 22–23 read (with minimal restoration): "If a man who has committed an offense against the king [flees] to another land [. . .] but it is not acceptable practice to kill (him)."

If these lines refer to a rebel against the Hittite king who flees abroad, then the question of his treatment is irrelevant because he would then be out of Hittite hands anyway. If it is assumed that he is extradited to face punishment in Hatti, then the whole episode of flight is irrelevant: the issue of the death penalty against an offender will arise whether he flees the country or not.

If, on the other hand, the subject is a rebel against some foreign king who is fleeing to Hatti, then an entirely different possibility arises. A foreign fugitive in the ancient Near East in theory had no rights. Unless and until he obtained the protection of the local ruler, anyone who met him could kill him with impunity, because there was no one to avenge him. His own sovereign would certainly not intervene on his behalf. Cain was painfully aware of the danger: "I shall become a wanderer on the earth and anyone who meets me may kill me" (Gen. 4:14). In a world organized into polities, however, it was regarded as uncivilized to murder a fugitive without grounds. The tale of the Egyptian Wenamun illustrates contemporary attitudes. After fleeing his enemies he is caught in a storm and shipwrecked on Alashiya. When the locals try to kill him, he seeks the protection of the local ruler by appealing initially to her sense of justice (and reputation): ". . . I have heard it said as far away as Thebes . . . : 'If wrong is done in every town, in the land of Alashiya right is done.' Now is wrong done here too every day?"[16]

The Hittite king evokes the same values, using the term *parṣu*, which in the international conduct of this period refers to appropriate behavior, as in

the phrase *parṣu ša šarrāni* "the etiquette of kings," not to legality.[17] The analogy then becomes clear: a populace that has scruples about attacking fugitive offenders who are without legal redress and might be considered fair game is hardly likely to attack merchants of a foreign power passing through on legitimate business.

The point of this argument may be seen if we consider the message of the section as a whole. The text before us is a political document, not a scientific treatise, and has to be read in its political context. The robbery of foreign merchants' caravans was a serious problem that engaged the diplomacy of the great powers of the Late Bronze Age. M. Liverani has analyzed the elaborate protocol employed in their correspondence on the subject.[18] First, the ruler of the murdered merchants sends a protest note to the ruler of the territory in which the crime was committed, attributing responsibility to the latter and demanding redress for the murder and compensation for the goods stolen. In response, the host ruler (a) denies knowledge of the incident (even though he has just been informed of it!) and (b) denies that any such incident could happen in his country. He then graciously agrees to investigate the incident. Ultimately, the demands of the protest note will be met, but it is not politic to admit liability in advance.

In response to the Babylonian protest about merchants being murdered in certain named provinces of the Hittite empire, the Hittite king offers the following response:

1. He denies that anyone is being murdered in Hatti. It is not clear that this was part of the original complaint; it may be an obfuscating technique.
2. By way of denying responsibility, he gives the Babylonian king a lesson in Hittite criminal law that stresses the role of the relatives of the victim. This is a trifle disingenuous, since the Babylonian king was perfectly aware of the elementary principles of homicide law.
3. To deny that such a crime could even occur on Hittite soil, he deploys an elaborate analogy with the treatment of political refugees.
4. He agrees to investigate the matter (without making any promises).

The law of homicide that the Hittite king expounded in ll. 17–22 is unfortunately broken at strategic points. It is clear that the brothers of the deceased exercise an option, the first part of which is to accept payment from the murderer (and purify the scene of the crime). The payment is called *mullû*, which the author translates as "compensatory payment" (similarly Klengel and Oppenheim). Since the murderer pays it in order to avoid

a worse fate, "ransom" would be a more accurate rendering. The second option is to reject the payment, but the sequence is broken. Oppenheim restores "execute" but Klengel, in line with his view that there is no death penalty, tentatively restores "make him their slave."

The second option may readily be restored from another Hittite source, the Edict of Telipinu 49, which unequivocally gives the alternatives as payment or execution:[19]

> A matter of blood is as follows. Whoever does blood,[20] whatever the owner of the blood says: If he says "Let him die!" then let him die; but if he says "let him compensate" then let him compensate. But to the king, nothing.[21]

The author dismisses this source as a special case, claiming that it applied only within the royal family (p. 31 n. 21). The grounds for this claim are not the wording of the text but its context: the Edict of Telipinu is concerned with the affairs of the royal household. Even if that were true, it is no proof that a different law of homicide obtained than for ordinary subjects. In fact, the Edict is not restricted to the royal family. It does begin with questions of succession within the royal family, but its scope then widens to management of royal granaries and finally (after a long gap in which the tablet is illegible) to private crimes that are of concern to the palace: namely, murder and sorcery.[22] The paragraph is, as H. Hoffner puts it, "the clearest statement about the society's procedure in the case of murder. . . ."[23] *CTH* 172 and Telipinu 49 together prove that the law of homicide in Hatti was based on the dual right of revenge or ransom.[24]

It is exactly the same principle as in Assyria, as can be seen from a comparison with the text of MAL B 2:

> If a man who is one of undivided brothers takes a life, they shall give him to the owner of the life. If the owner of the life chooses, he may kill him, or if he chooses, he may reach a settlement and take his inheritance share.

The "owner of the blood/life" in the Hittite and Assyrian laws is the blood avenger, presumably a close relative, such as the brothers in *CTH* 172. In spite of being the owner, however, the relative does not possess the blood or the life; it has been taken away by the murderer. What he has is the right to get it back, which he can achieve by killing the murderer. This is the very demand that the Babylonian king makes of the Pharaoh when protesting the murder of Babylonian merchants in Egyptian territory (*EA* 8:28–29): "And the men who killed my servants—kill them! Return their blood!"

The author comments that this demand "is elusive and difficult to understand. It may be akin to an Israelite concept, which holds that the blood of

the victim is lost and needs to be returned . . ." (pp. 181–182). There is no need to regard it as elusive, for the author has correctly discerned its conceptual basis. It is indeed the same as that of the biblical "redeemer of blood," the relative who by killing the murderer regains the property lost—the blood of the victim—for himself and his family, as in all cases of redemption.

An expression discussed by the author in this regard casts further light on the alternative of ransom (pp. 170–173). She points to a discrepancy between the law codes and documents of practice in the use of the expression *dīn napištim* ("capital case"). In the law codes it refers to a crime where the death penalty is imposed, for example LE 24 and LH 3.[25] In Mari contracts and letters, on the other hand, it refers to a payment, sometimes called "to pay a life" (*napištam mullû*).[26] The reason is that what was being paid in a "capital case" was ransom to avoid the death penalty that would otherwise be applicable.[27]

These sources also inform us of the role of rulers in this system of redress. The Edict of Telipinu stresses that the remedy was a private right, in which the king would not interfere. In certain circumstances, however, the ruler could act as a surrogate avenger. Where the right was impossible for a private party to enforce, as where the crime took place in a foreign country, rulers were entitled by international custom or treaty to intervene.[28] The statement of the Babylonian king in *EA* 8 demonstrates the theoretical basis of the ruler's authority. He refers to the merchants who have been robbed and murdered as "my servants" and identifies with them even further: "I have been robbed in your land!" The king was a head of household writ large and its members his servants. Any attack on the members of his household was an attack on him, for which he was entitled to seek redress.

The level of intervention varies. If we go back in time to the previous international age, we find treaties dealing with robbery of merchants by means of extradition clauses. In a treaty between an Assyrian merchants' colony and the local Anatolian prince, the merchants demand:[29]

> 7–11. If there is blood in your land, you must hand over the murderers to us so that we may kill them.[30]

Another such treaty reads:[31]

> 39–45. If they do blood of an Assyrian in your city and land and there is loss (of property), for the blood ([*a-n*]*a da-me-e*) you shall hand over to us the one decided upon (*ší-im-tám*) so that we may kill him. You shall not hand over another to us as a substitute (*ša-ni-a-am pu-ḫa-am*).[32]

Almost a millennium later, David and the Gibeonites come to a similar arrangement. The Gibeonites reject ransom from the immediate family of the murderer (Saul) on the one hand and the execution of substitutes from among the Israelites on the other. Instead, they decide upon the sons of the culprit as suitable objects of revenge, applying the doctrine of vicarious revenge. Seven of Saul's male issue are duly handed over to the Gibeonites for execution (2 Sam. 21:1–6).

By the same token, the local ruler had the responsibility of enforcing the victim's family's rights. *CTH* 172 hints that he might discharge this duty by handing over the killer to the victim's relatives for execution. There are, however, other possibilities: execution of the culprit by the ruler himself (*EA* 8) or payment of blood-money to the victim's relatives on an insurance principle, irrespective of whether the culprit is caught (Carchemish-Ugarit Treaties). Within a state, LH 23–24 imposes the insurance principle on the local authority, where a murderer from outside the community cannot be caught.[33]

All the above elements—revenge, ransom, and the role of the king—come together in a letter from an official of Mari regarding events that he witnessed at Andarig.[34] He reports that A, a young man from Kurda, was held in the house of B, a general of Andarig, as a prisoner-of-war ("slave"). B died of natural causes. B's brothers, however, accused A of his murder and claimed that they had witnesses. They brought him before the king, who (presumably after a hearing, not recorded) handed A over to B's brother C "for revenge" (*ana niqmim*). The visitor from Mari tried to intercede with the king but the king declared that he would not accept even 100 shekels (an enormous sum) for the young man's life, that C as the offended party was entitled to kill A.[35] C then subjected A to a slow, cruel, and publicly humiliating procedure, apparently by way of execution (A's death is not explicitly stated).[36]

3. Talio

The author points out that talio is not the theoretical basis of execution for homicide in Mesopotamia (pp. 159–169). It is true that the examples of homicide cover a wide variety of situations and levels of culpability, and execution is not the only possible punishment. It is worthwhile, however, examining the Mesopotamian sources more closely. The relationship between homicide and talio that emerges is not straightforward, but replete with nuances. Sometimes there is a conscious effort is to make the killer's execution talionic in nature and sometimes there is a conscious effort to eschew talio. Talio is a measure of justice that can be maintained when

appropriate and derogated when a different message is to be sent as to the seriousness of the offense.[37]

In the author's definition of talio, the act of punishment must be similar to the offense in the aspects in which the original act was wrong (p. 158). Biblical law, as opposed to cuneiform law, uses the same means of punishment as was used in the offense (p. 159). In fact, cuneiform law consciously applies this principle, through strict equivalence of the manner in which harm is inflicted. A letter of king Rim-Sin of Larsa orders: "Because he threw the boy into the oven, do you throw the slave into the furnace" (*BIN* 7 10:7–10).

By contrast, a biblical narrative applies the same principle, but emphasizes that strict equivalence of manner is inadequate to punish the crime in question. For taking away Uriah's wife, David is informed that his wives will be taken from him (2 Sam. 12:11–12). Thus far there is still an equivalence of harm, since David has many wives and Uriah had only one. The narrative stresses, however, that the manner of taking will be different and more painful:

> "I shall take away your wives before your very eyes and I shall give them to your neighbor, who will sleep with your wives in the light of this sun. For you did it in secret, but I will do this thing before all Israel in broad daylight."

The example of David illustrates another form of talio that we have seen in Mesopotamia: vicarious talio. The author does not regard vicarious punishment as talionic, apparently because its purpose was to make good the loss to the household (pp. 161–162, 169). I admit that I fail to follow the author's reasoning at this point. If the victim is conceived as the one who has lost a son or a wife, then killing the culprit's son or wife expresses a principle of legal symmetry: there is a reversal of roles between culprit and victim. An unusual form of vicarious punishment from the Bible, although not in itself talionic, is deliberately given an interpretation that makes it express the talionic principle:

> You shall not abuse any widow or orphan. If you abuse them, when they cry out to me, I shall hear their cry. My anger will burn and I will kill you with the sword and your wives will become widows and your children orphans. (Exod. 22:21–23)

God as the surrogate avenger punishes the oppressor of helpless widows and orphans by placing the oppressor's own family in the same helpless position.

Mesopotamian notions of the appropriateness of talio as a punishment are made manifest by comparison of the two paragraphs on distraint

discussed above. In LH 116, the creditor who causes the death of a debtor's son whom he has detained is punished by having his son killed, but in LE 24, where the creditor compounds the offense by detaining the debtor's wife or son without a rightful claim of debt, it is emphatically the creditor himself who must die (*dīn napištim nēpû ša ippû imât*). The difference in penalties lies not in the measure of loss, which is the same, but in the moral turpitude of the offense. The Mesopotamians thus used the talionic principle as a theoretical yardstick, even when they chose not to apply it.

The influence of talionic thinking is demonstrated most powerfully by an example of the opposite case, where it is imposed upon a situation that does not call for it. In the oaths that Esarhaddon made various vassals and officials swear in order to secure loyalty to his designated successor Assurbanipal, a bizarre scenario is envisaged. If, after the death of Esarhaddon and while Assurbanipal is still young, a usurper murders him, the oath-takers must rise against the usurper, kill him, and put a son of Assurbanipal on the throne. If the scion is not yet born, the oath-takers must ensure that the woman pregnant with him safely gives birth, raise the child, set him on the throne, and kill not only the usurper but also all his issue.[38]

The usurper's crime falls into the category of crimes against a hierarchical superior, for which collective punishment is appropriate and normal, just as Naboth's sons were executed together with him for an offense against king and God (2 Kings 9:26).[39] The drafter of the oath, however, preferred to see the punishment as talionic justice for murder: "you shall shed blood for blood (*dāme kum dāme . . . tatabakāni*) and avenge Assurbanibal."

4. Revenge and Ransom

As we have seen, the avenger in Mesopotamia and Anatolia in principle had a choice between actually exercising vengeance or accepting ransom. The oath imposed by Esarhaddon emphatically rejects the ransom option, by explicitly describing the obligation as revenge and by using a talio of manner that leaves no room for doubt.

Identical language is used in Gen. 9:6 to express the same sentiment, but without regard to any special circumstances: "He who sheds a man's blood, by man shall his blood be shed."[40] While the author is right in saying that biblical law makes execution an application of *lex talionis*, the Assyrian background of this verse shows that its appeal to talionic principles has an ulterior motive. Gen. 9:6 is attributed to the Priestly source in the Bible, which uses the same reasoning to prohibit ransom:

> You shall not accept ransom for the life of a murderer whose wickedness deserves death; he shall be put to death. . . . [T]he land shall not be expiated for the blood shed on it except by the blood of the one who shed it. (Num. 35:31, 33)

The Priestly source is evidently polemicizing against a common practice. Indeed, the choice between revenge and ransom is considered perfectly legitimate in another biblical source (Exod. 21:30). The talionic formula would seem at first sight grist to the Priestly mill, but the more common form, "life for life, eye for eye, etc.," without talio of manner, turns out to be as much a hindrance as a help.

In the cuneiform law codes, "x for x" was regularly used to denote restitution, of a slave or animal or the like. To give it the exclusive meaning of death (or injury), more explicit language was needed, language that gives an ironic twist to words of restitution, as in the Esarhaddon treaty. The biblical formula, however, appears to have been well established as a legal maxim, being used in contexts such as causing a pregnant woman to miscarry, where the list of injuries has little or nothing to do with the punishment that it is supposed to be characterizing (Exod. 21:23–25). While establishing the equivalence of revenge in principle, it did not exclude ransom, which was regarded as a normal part of the system of retribution.

The Priestly source tackles this problem in Lev. 24:17–21. It explicates the words of the formula, while studiously avoiding the application of "life for life" to homicide. Instead, it is applied to the death of an animal, using language that is inappropriate. Killing an animal is not naturally described as striking the life of the animal (*mkh npš bhmh*). The death of an animal would typically be a result of negligence, in a contractual setting, as for example in LH 263, where a negligent herdsman must restore "ox for ox, sheep for sheep" to the owner. At the same time, simple restitution would not be adequate in more serious cases, as with the thief who kills a stolen animal and has to restore it four- or fivefold (Exod. 21:37). The biblical passage is therefore placing a strained, narrow interpretation on the phrase "life for life": you may think that it can mean killing or restitution, but it means restitution only when applied to an animal.[41]

The above understanding of the Leviticus passage as an interpretation of the talionic formula is not new: I proposed it some decades ago in several publications.[42] What I failed to grasp at the time is the importance of this passage for the history of ideas.

In modern legal systems, a fundamental technique is the legalistic reading of the language of statutes and documents. Lawyers are notorious for using

the technique to give the words a counter-intuitive meaning, narrowing or expanding the scope of the text. The technique itself is not intuitive but depends on certain developments in logic, such as the ability to define terms and to create universal categories, which in turn lend the legal text a quality of autonomy.

The technique can be traced back to Roman jurists and beyond them to Greek forensic orators, but not beyond the era of classical Greek philosophy, on which it relies.[43] Cuneiform literature provides virtually no evidence of it, apart from some possible harbingers in the first millennium. In the cultural sphere of ancient Israel, it is systemic among Rabbinic jurists. An excellent example from early Rabbinic sources illustrates the full force of the technique, using the very biblical passage under discussion to force a counter-intuitive interpretation on another passage:

> "An eye for an eye" (means) money. You say (it means) money, but perhaps (it means) nothing other than a real eye? Rabbi Ishmael said: "It is stated: 'He who kills a beast shall compensate for it and he who kills a man shall be put to death' (=Lev 24:21). Scripture draws a comparison between damage to a man and damage to a beast: just as for damage to a beast there is compensation, so for damage to a man there is compensation."[44]

In the Bible, Lev. 24:17–21 is the sole example of legalistic interpretation of a text, even if the text was still a legal maxim rather than a formal law. To my knowledge, this makes it the earliest example of classical jurisprudential technique in the Near East. Whatever date is attributed to the Priestly source, it is unlikely to pre-date the Greek parallels. On the other hand, it is impossible to say whether it is derived from a Greek source or whether it indicates shared ideas that were circulating in the eastern Mediterranean in the mid-first millennium.[45] At all events, it represents a pivotal moment in the development of jurisprudence, or at least of modern Western jurisprudence.

5. Ransom and Pollution

Lev. 24:17–21 follows upon, and apparently arises from, a ruling imposing the death penalty for blasphemy (vv. 10–16). The motivation behind the Priestly source's hostility to ransom provides the clue to this unexpected contextualization of a homicide law. Blasphemy is a different category of crime from homicide; it is an offense against God that pollutes the land and therefore requires community action to suppress it. These sentiments are expressed in Num. 35:33–34 as the rationale for forbidding ransom:

> You shall not pollute the land in which you live; for blood pollutes the land and the land shall not be expiated for the blood shed on it except by the blood of the one who shed it. You shall not contaminate the land in which you live. . . .

Barmash stresses that this notion of the polluting character of homicide is not shared by the cuneiform sources, where homicide pollutes at most the immediate area of the slaying (pp. 94–115). On the other hand, in both Mesopotamia and Anatolia offenses against the gods such as incest and bestiality do cause widespread pollution, requiring death or expulsion of the culprit and cleansing of the city from which he was expelled.[46] Thus the Priestly source appears to be engaged in an attempt to shift murder, hitherto understood as a purely private matter between the culprit and the victim's family, into the category of public offenses such as blasphemy, apostasy, and incest.

The same tendency is apparent over the same period in ancient Greece. Homeric homicide law is firmly based on private revenge, and the Homeric system of values still sees ransom as a desirable alternative.[47] In trying to persuade Achilles to mend his quarrel with Agamemnon and accept his gifts of appeasement, Ajax uses the analogy of homicide:

> . . . a man accepts ransom from the killer of his brother or for his dead son; and the killer remains in his own land for the paying of a great price, and the kinsman's heart and proud spirit are restrained by the acceptance of ransom. (*Il.* 9.632–636)

By the fifth century, Athenian homicide law is still based on revenge by the family, but that revenge has changed from a right to a duty. One of the reasons given is that it is necessary to free the whole state from pollution caused by homicide.[48] As a relative of the victim prosecuting the killer expresses it:

> "We well know that, the whole state (*polis*) being polluted by him until he is prosecuted, the religious offense is ours, and for your error the penalty falls on us if we do not prosecute him as we ought" (Antiphon 2a.3).[49]

So far from ransom being an alternative, a payment to forgo prosecution was regarded as a type of bribe (*hypophonia*). It was considered disgraceful and even impious.[50]

6. Asylum and Exile

The cities of refuge have generated a rich literature on the many problems that they raise. It is not my intention to enter into any of the debates on the main issues: their existence in reality, their chronology, the relationship between the sources, and so forth. Rather, I wish to add marginal notes to these debates by looking at the legal institutions of asylum and exile from perspectives that have not received much attention.

My point of departure is Barmash's separation of altar asylum from the cities of refuge and her observation that altar asylum protects from political intrigue, not from the punishment of homicide (p. 73). I see no reason why both should not fall under the same general conception of the altar as a sacred space that offers protection for anyone in fear of his life, for whatever reason. It is this view of asylum that is suggested to Nehemiah by those who fear his murder at the hands of political enemies (Neh. 6:10–13). The protection offered by the sacred precinct is divine, not human. There was no one to stop Benaiah from killing Joab at the altar where Joab had taken refuge; it was his scruples about profaning a holy site that made him hesitate (1 Kings 2:30). The only connection of this type of asylum with homicide lies in a single exception: a murderer cannot benefit from its protection (Exod. 21:14). David invokes this exception to overcome Benaiah's qualms (1 Kings 2:31–34).

Altar asylum of this nature is well attested in the Mediterranean as far back as the seventh century and continues into the Hellenistic period, as the examples collected by M. Weinfeld show.[51] The cities of refuge, on the other hand, are secular and require some human mechanism to make their protection effective. Leaving aside the uncertain case of Exod. 21:12–14, they are referred to in no less than three Pentateuchal laws.[52] While varying in details, all three laws focus on the same special situation: a killer faces summary execution unfairly because his crime is not what it seems; he lacked the guilty intention (*mens rea*) that would make his act murder. Such variations on a common theme point to their all originating in a canonical scholarly problem of the type that makes up much of the cuneiform and biblical law codes.[53] Nonetheless, it is found in none of the cuneiform law codes, even though LH 206–207 shows that Mesopotamian law took into account *mens rea* in homicide. This may be attributable to the chances of discovery, but it is odd.

The precedent would have existed as long as the distinction between intentional and unintentional homicide had existed, which makes it unlikely that the biblical case originated in an actual lawsuit within living memory.

On the contrary, the pathetic character of the situation—a sympathetic hero is forced to flee to avoid unwarranted retribution for a tragic accident—gives the impression that it is a literary topos. (It is a stock component of popular melodramas to this very day.) To my knowledge, no such topos appears in Mesopotamian literature, historiographic or mythical. There are many accounts of persons running away and seeking asylum, but they are slaves, debtors, or political refugees, and the possibility of a killer undeserving of punishment being among them is not adumbrated.

When we look to the West, however, the situation is well established as a literary topos. In the world depicted by Homer, there are many examples of sympathetic killers fleeing retribution (e.g. *Il.* 2.661–666; *Od.* 15.271–273). In *Il.* 23.86–90 the hero Patroclus himself recalls how as a boy he fled his homeland because in his folly he had killed another boy over a game of dice, not willingly (*ouk ethelōn*) but in anger. The same literary topos, albeit involving a justified killing rather than an unintentional one, is found in the account of Absalom, who killed his brother Amnon for raping his sister Tamar and then fled to a neighboring kingdom (2 Sam. 13).

Exile is the corollary of asylum, although as Cain's complaint makes clear, while every asylum is an exile, not every exile includes asylum. The three biblical laws foresee the city of refuge in terms of long-term exile.

Exile as a punishment is found in cuneiform laws, but it differs from biblical exile in two important aspects. First, it is far less harsh in that it excludes the culprit from his city but apparently leaves him free to live elsewhere in the kingdom. Second, in the two recorded cases, it applies to crimes against the deity that endanger the whole society, namely, sexual deviations (LH 154, Hittite Instructions to the Commander of the Border Guards (*Bēl Madgalti*) III A 9–16[54]). It does not appear to be contemplated for murder, which may again be due to the tiny sample, but the two cases do come from entirely different regions and the Hittite Instructions confine it to *ḫurkel*, often translated "abomination" but limited by Hoffner in his study of the Hittite Laws to "unpermitted sexual pairing."[55] The Hittite Instructions also require the city to purify itself afterwards, indicating that it was a polluting crime.

In Greece, the nexus between exile and murder is established in the laws as well as in literary accounts. According to the homicide law of Drakon, a person who commits homicide without premeditation (*mē ek pronoias*) is to be exiled.[56] According to a restoration of the text based on a law cited by Demosthenes 23.28, should the exile return to Athenian territory, he could be killed on the spot or prosecuted, but it was forbidden to take ransom (*apoina*) from him.[57]

There was no set term on the killer's exile, but he could be pardoned by the victim's family. The Drakontian law ranks the right to pardon in concentric circles of family and clan analogous to the structure found in biblical law (Lev. 25:49; Num. 27:8–11). The first rank were members of the victim's father's house; failing those, members of his lineage; failing those, members of his phratry (a clan-like association). At each rank, the decision to pardon had to be unanimous.

7. Unresolved Tensions

The three biblical laws on cities of refuge, stemming from the Priestly and Deuteronomic sources, present a series of paradoxes. They are brought into clearest relief by the explicit ideology of the Priestly version, but they apply in equal measure to the Deuteronomic version.[58]

i. The author stresses that the Priestly doctrine regards murder as polluting the land (pp. 94–106). It is therefore imperative that it be avenged: no ransom payment is allowed in order to forgo revenge or to allow the killer to return from exile. The effect is to change the nature of vengeance from a right to a duty. Failure to perform that duty will endanger the whole nation. In spite of this, P still presents vengeance as entirely within the initiative of the victim's relatives.
ii. While the initiative for vengeance stems from within the clan structure, adjudication is not clan-based at all. On the contrary, it is unabashedly urban, with no hint at a role for the clan as a unit.
iii. The king is notable for his absence, but the Priestly rules are such as to require some over-arching authority to enforce them, beyond the limited powers of local elders. For example, who is to punish the victim's relatives for accepting a payment to allow the killer to leave his exile before the death of the High Priest, or to enforce the prohibition on vengeance thereafter?
iv. It is only this one case of homicide that contemplates revenge by private initiative. The laws of P and D on other serious crimes such as wounding, rape, and adultery rigorously exclude, at least on the surface, any reference to private initiative and revenge. Their forum is the local urban court and their language of punishment is impersonal or by collective action, as if the clan did not exist.
v. Comparison with the biblical homicide laws outside these two sources only serves to reinforce the above paradoxes:

a) It is a narrative that attributes an independent role to the clan (2 Sam. 14:11–17), although the clan shows a curious reluctance to exercise the kind of self-help that the three laws take for granted, demanding instead that the widow hand over her son, which in turn suggests that some judicial process is contemplated. The same narrative provides the missing over-arching authority. The king has the authority to intervene to pardon the killer (even if he does so with reluctance) and he has the executive power to enforce that pardon (as he eventually does for Absalom).
b) In the Covenant Code the victim's family reappears as a protagonist in homicide, in the revenge and ransom provisions of the laws of the goring ox and causing a miscarriage. It is true that the family is not depicted as taking the initiative, but they are still more involved than in the non-homicide criminal laws of P and D.

In summary, the homicide laws of P and D do not appear to be consistent with what evidence of practice there is in the Bible, nor with other homicide laws in the Bible, nor even with their own doctrines. The author dismisses the laws of Exodus as foreign intrusions (p. 146), but even special pleading will not save these homicide laws from their own internal inconsistencies.[59]

8. East versus West

In attempting to resolve these contradictions, we should perhaps look first at the literary element. As I mentioned above, the scholarly legal problem that the P and D versions represent has the quality of a literary topos. The tensions between and within the biblical sources may reflect the same dichotomy between literary topos and banal reality found in the Homeric epics, where the reaction of the heroic protagonists gives the impression that homicide was governed entirely by a system of personal vendetta, but the trial scene on the shield of Achilles unexpectedly reveals the existence of a local court dealing with a case of homicide.[60]

The second element that may help us is the structure of homicide law that we have seen in the societies surrounding biblical Israel. They resolve themselves into two poles. The legal systems of the Near East are characterized by the revenge/ransom system, and in some areas the system explicitly takes into account the initiative of the victim's relatives. The same system is in operation in the Homeric epics. In fifth-century Athens, by contrast, homicide is treated as a polluting offense that recasts the exaction of punishment as a duty. The role of the victim's family and clan is still central to

the Athenian law, but within a system of courts and prosecution, with self-help arising only in special circumstances. The contrast is therefore not so much between Israel and Mesopotamia as between the Near East of the second millennium and the Mediterranean of the mid-first millennium. Israel sits uncomfortably astride these two axes of time and space, for it is an actor in a revolution of thought that manifests itself around the eastern Mediterranean between the eighth and the sixth century. Its homicide laws reflect the tensions that result.

Postscript

Two of the documents edited contain an elementary error of translation, presumably by oversight.

1. Wiseman Alalakh 17:2–4 is translated: "Shatuwa son of Suwa of Luba has made a payment to Apra for his daughter[-in-law?]" (pp. 41–42). The verb, however, is *ša'ālu* "to ask," not *šalāmu* "to pay" and the translation ignores the word "daughter" in the text. The correct translation is: "S. asked Apra for his daughter as a daughter-in-law." It is doubtful that the document concerns homicide at all; it is more likely that it is a case of treason, in which the culprit is executed and his goods confiscated by the Palace. The text has frequently been edited; for a reliable translation, see J. J. Finkelstein 1969: 546.
2. RS 17.146:9–11 (also ll. 31–33 and RS 18.115:8–9 and 23–25) is translated: ". . . the citizens of the land of Carchemish will ask for any property or goods of their brothers thus and will pay in full" (184–188). The verb is not *ša'ālu* "to ask" but *qabû* "to say" and is in a relative clause. The correct translation is: "they shall reimburse all of their goods that their brothers declare."

Notes

1. Barmash 2005.
2. The term *mār awīlim* and other combinations with *mār* as indicators of status are discussed by Kraus 1973: 65–77.
3. Kraus 1958: 148.
4. Müller 1903.
5. Roth 1997.
6. Borger 1982: 39–80.
7. Finet 1996.

8. Driver and Miles 1956: 88.

9. Yaron 1988: 146–148.

10. In the light of these conclusions it is worth reexamining other texts where *mār awīlim* has been taken as meaning a free man. In the Old Babylonian treaty between Nerebtum and Shadlash, lines 4–8 contain a tariff (possibly for the ransom of captives in the war ended by the treaty) usually understood to be for free men, slaves, etc. I would translate: "The tariff is: the son of a man, 20 shekels; the slave of a man, 15 shekels; the female slave of a man, 10 shekels; whether old man or old woman, [child?] or baby"; see Greengus 1979: 73–77.

11. P. 132. Neither apply vicarious talio. On p. 162, she refers to the victim in one of these laws as "a woman of free status."

12. Most probably, the woman in 21 is married but still living in her father's house, an Assyrian custom that we know from paragraphs 25–27. Another possibility is that she lives with her husband in her father-in-law's house, the latter acting in loco parentis. The important point is that the woman's father, not her husband, is the plaintiff.

13. *KBo* I 10 rev. 15–26. Translated by Oppenheim 1967: 144; edited and discussed by Klengel 1980: 189–197. The author transliterates and restores the text on pp. 109–110.

14. Although she does not give the restored Akkadian text, the author's translation [their slave] in l. 22. is based on the restoration [*ana ardūtišūnu li*]-*pu-šu*, similar to that proposed by Klengel 1980 and *CAD* D 26 sub *da'ikanu*. See n. 19 below.

15. Haase 2003: 644.

16. Translation by Lichtheim 1976: 2:229.

17. The author's rendering "not permitted" is misleading, inferring a legal prohibition; Klengel ("Brauch"; see 1980: n. 31) and Oppenheim 1956: 144 ("customary") are more accurate. See now Artzi 2005.

18. Liverani 2001: 60–61.

19. Hoffmann 1984.

20. The phrase "to do blood" meaning to murder is also found in Akkadian at Ugarit (RS 17.229:9 *ša* BE *e-te-ep-šu*) and at Kültepe (see n. 31 below).

21. The paragraph does not help in restoration of the actual words of line 22, where the traces suggest an expression with the verb *epēšu*. *CAD*'s restoration (D 26), upon which Klengel's translation is based, is [*ana ardūtišūnu lī*]*pušū*. The expression *ana mārišu epēšu* is found in Late Bronze Age texts, but an equivalent *ana ardišu epēšu* is not known to me. I would tentatively suggest [*kima libbišūnu ip*]*pušū*, "they shall do as they think fit"—a well-known expression from the period that encompasses the right to execute (cf. MAL A 14; RS 17.228 = *PRU* IV 141–142). I withdraw my earlier suggestion of *dāme epēšu* (1988c: 51–52 n. 57), as it is attested only in reference to murder, not execution.

22. Haase 2005: 56–61.

23. Hoffner 1997a: 311.

24. Not "capital punishment and compensation," as the author characterizes it (Barmash 2005: 183 n. 10). Capital punishment is a misleading term, since it is generally understood to mean a sentence imposed by a court. Revenge is a right upheld by a court, and like all rights, presumes a choice in the right-holder. Compensation and ransom are two entirely different concepts. The one takes as its measure the harm suffered by the victim; the other, the harm that the culprit wishes to avoid.

25. In the other two examples, LE 48 and 58, the death penalty is applicable but not necessarily imposed.

26. Cf. MAL A 50, 52.

27. The description of heavy payments in the penalty clauses of Mari contracts (as high as 10 mina) as *dīn napištim* shows that failure to pay would result in execution. As alien as this idea seems to us, it is proved by a biblical example: "Your life for his, or you will pay a talent of silver" (1 Kings 20:39).

28. On the application of international law, see Westbrook 1999b: 28–41, 239–242.

29. Çeçen and Hecker 1995.

30. *šu-ma da-mu i-na ma-ti-ka i-ta-ab-ší dá-i-ki lu ta-du-nu-ni-a-tí-ma lu ni-du-ku*.

31. Kt 00/k 6, edited by C. Günbattı 2004.

32. The editor translates *ana dāme* "the fixed amount for the blood-money," but there cannot be both payment of blood-money and execution.

33. If the author's interpretation of the Neo-Assyrian debt-note *ADD* 618 is correct (pp. 57–60), namely, that it concerns the killing of an avenger, it suggests the intriguing possibility of an ongoing blood-feud between villages that was settled by a collective payment to the last victim's family. (Silim-ili, the killer of the avenger, need not have been the one who killed previously, as the author assumes, but may himself have been avenging the avenger's victim.)

34. Newly collated and reedited by Durand (2002), whose translation and restoration is followed here.

35. Ironically, the youth's father, a notable of Kurda, had earlier agreed with B on a ransom of 30 shekels to release his son from captivity and at the time of B's death had gone back to Kurda to raise the money. The king of Andarig actually sent a letter to the king of Kurda informing him of his judgment.

36. He bored a hole through his nose and attached a rope, he cut off his ears, cut open his thighs, partially flayed him, and led him around town 30 times. According to Durand, the Mari visitor was disgusted by the affair, but not just because of the unusual cruelty. Durand speculates that the visitor, a progressive, regarded the practice of vendetta as a barbaric relic, an archaic tribal custom from a time when there was no central authority to ensure justice. Quite apart from its familiar ring of romantic anachronism (the city-bred liberal shocked at the savage tribesman and his self-help methods), Durand misses the point. The general was not shocked at the system, but at the fact that the accused, in his

eyes, was innocent. The system was the antithesis of vendetta, since the brothers, in spite of having a slave in their hands, did not take the law into their own hands, but deemed it necessary to bring him before the authorities for trial.

37. For a more detailed discussion of the material analyzed below, see Westbrook 1988c: 39–83.

38. Parpola and Watanabe 1988: 38–39, lines 237–258.

39. Westbrook 2003b: 75–77.

40. Heb. *špk*. Assyrian *tabāku* = *šapāku*: *AHw* 1295.

41. It is interesting that in attempting to defend the coherence of the passage the author is forced into equally strained reasoning, such as an ad hoc "cognitive distinction" between repaying in kind and paying in currency (Barmash 2005: 157–158).

42. Westbrook 1986a: 68–69; Westbrook 1988c: 80–81.

43. See Westbrook 2000; Asper 2004 tries to reverse the process, claiming that forensic debate gave rise to philosophical reasoning.

44. Mekhiltah (Nezikin 8) to Exod. 21:24. The Rabbis, of course, were concerned to interpret the biblical maxim in the opposite way to the Priestly code, so as to exclude any physical *talio*.

45. The Priestly source has close connections with coeval Greek sources. For example, the case of the daughters of Zelophehad (Num. 27:1–11; 36:1–12) reveals the same restrictions on the inheriting daughter as are found in the Athenian *epiklēros* and in immense detail for the *patrōiōkos* of the Laws of Gortyn. See MacDowell 1978: 95–98 for the former, and Willetts 1967 Col. VII 15–IX 24; XII 6–19 for the latter.

46. Westbrook 1988c: 81–83 and see below.

47. Homeric epic is generally attributed by scholars to the seventh century, but it contains traditions that may go back into the Bronze Age.

48. MacDowell 1999: 1–5.

49. Notwithstanding this and similar statements by Antiphon, which were addressed to a jury, the precise role of pollution in the Greek law of homicide remains a matter of debate. It was certainly not the sole factor, as MacDowell demonstrates (1999: 147–150). Religious ideas about pollution in Greece were not coextensive with biblical notions of impurity, as the author rightly points out (p. 100 n. 22, cf. Parker 1983: 104–143, esp. 130–131, noting its absence in Homer). The present discussion is about the mere existence of pollution as a factor.

50. MacDowell 1999: 9–10.

51. Weinfeld 1995: 120–132. Weinfeld suggests that the same type of asylum existed in holy cities in Babylonia in the first millennium (pp. 121–122). A hyperbolic reference in a letter to Esarhaddon claims that whoever enters Babylon enjoys protected status (Reynolds 2003: 130–132, lines 9–11): Also, "Babylon (is) 'the bowl of the Dog of Enlil.' Its name is established for protection (*kidinnu*). Not even a dog that enters inside it is killed." The term *kidinnu* when applied to

a city usually refers to immunity from taxes and other such privileges for the inhabitants. It might refer to protection from government action, and a person could also be under the protection of a god, but there is no evidence that it extended to asylum from private enemies. See *CAD* Vol. K 343 (*kidinnu* b), 344 (*kidinnūtu*) (Leemans 1946: 58–59).

52. The author's emphasis of the disjunction between the place (*mqwm*) in v. 13 and the altar in v. 14 is well taken, but her attempt to make the law entirely about secular refuge is artificial (pp. 76–78; see now Stackert 2006: 224–229).

53. For a full discussion of the phenomenon of canonical scholarly problems, see Westbrook 1988a.

54. Schuler 1967: 36–65.

55. "Inside the laws it denotes instances of sexual pairing which for some reason were considered inherently inappropriate. It does not pertain to instances of extramarital sexual misconduct like fornication and adultery" (Hoffner 1997b: 224).

56. Stroud 1968: line 11. The verb is actually "flee" (*pheugen*).

57. Stroud 1968: 54–55; MacDowell 1999: 119–122.

58. For the purposes of the present discussion, it makes no difference what the version in Josh. 20:1–9 owes to P and what to D.

59. It is regrettable that in pursuit of biblical exceptionalism, the author repeatedly seeks to exclude inconvenient evidence. Apart from the above example:

(i) We have already seen that Telipinu 49 is dismissed as a special case.

(ii) The value of *EA* 8 is questioned as being an oblique reference (p. 107) and "elusive and difficult to understand" (p. 182).

(iii) In *CTH* 172, the Akkadian term *ašra ullalū* may not refer to purifying the place of the murder because the equivalent Hittite verb can also mean to exonerate oneself by oath. The author expresses her doubts in her translation: "The place in which the killing occurred is purified [?]" (p. 110). In a later translation of the same passage, it should be noted, the question mark is omitted (p. 183).

(iv) *Lex talionis* is narrowly defined so as to exclude various cuneiform examples. Even the law of the Roman Twelve Tables, whence the term *talio* is taken, is not talionic enough (pp. 169–170).

(v) Status is declared not to be a factor in biblical (as opposed to Mesopotamian) law, with the sole exception of slavery (p. 175). It is hard to think of a greater exception.

(vi) A number of texts are declared not to prove the existence of an institution because they are the sole reference to it: Deut. 17:8–10 (role of central government); 2 Sam. 14:1–17 (role of king); LH 24 (role of community groups). Given the paucity of sources altogether, the utility of this approach might be questioned, but there is a more serious objection. Legal institutions rely on normative rules, not statistical frequency, for their validity. One example suffices to establish a norm.

60. See Westbrook 1992b: 67–70. [Chapter 1 in the present volume.—Eds.]

CHAPTER TWELVE

The Early History of Law
A Theoretical Essay

Abstract
This article surveys early modern histories of the development of law to show that these accounts were at first shaped by teleology and later by evolutionary theory. The late-nineteenth-century discovery of the cuneiform documents of the ancient Near East did not immediately challenge the evolutionary approach, but over time it became clear that these documents, rather than representing a primitive form of law, were the results of a developed system that was widely diffused throughout the Mediterranean basin. This system was characterized by the absence of definition, citation of authority, and jurists. It persisted until the seventh century B.C.E., when early forms of Greek philosophical thought began to have an impact. This new thinking gradually transformed concepts and applications of law until by the fourth century B.C.E. a clearly new form of law emerged that displayed all the features of a modern legal system.

I

The question of how law began first received serious consideration not from historians but from philosophers of the European Enlightenment in the seventeenth and eighteenth centuries. It formed an important part of their inquiry into the original state of nature and how it developed into civil society. As might be expected, their arguments are elegant and persuasive, but from a modern perspective they are problematic, for two reasons.

[Originally published in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (*Romanistische Abteilung*) 127 (2010): 1–13. Reprinted with permission, which we gratefully acknowledge.—Eds.]

First, their reasoning is not historical but teleological. The real purpose of their supposedly historical inquiries was to reform modern society, not to make an objective scientific study for its own sake. Thus for Rousseau the original state of nature was peaceful, with individuals living in harmony and having no need for law. It was the imposition of government that led to violence and tyranny. Rousseau's "historical" perspective was in fact an argument for the need for a social contract as the basis of government, in order to return to the pristine harmony of early society.

By contrast, Hobbes had earlier reconstructed the life of early man as "solitary, poor, nasty, brutish and short." Matters only improved with the imposition of law. This Hobbesian history was in essence a plea for the absolute power of the sovereign, which alone offered security from the violence that existed in a state of nature.

The second problem with the philosophers' reconstruction was their evidence.

They relied on what was available at the time, which was of two types. The first was gleanings from classical literature, namely, the accounts of the patriarchs in the book of Genesis, certain notices in Homer on primitive peoples, such as the Cyclopes, and occasional speculations to be found in the work of Greek and Roman philosophers and historiographers.

Furthermore, the chronology that they applied to these ancient sources was biblical. Accordingly, Genesis and Homer represented the earliest history of society. Giambattista Vico in his "New Science" of 1744 set out a chronological table that reckoned the age of the world at the Flood at 1656 years and at the time of Abraham at around 2000 years.

The second type of evidence that the philosophers applied came from published observations on contemporary savages in newly discovered territories (the Americas, Australia, and Africa). The connection between the two types of evidence was based on a historical determinism derived from the new discipline of ethnography. Under this doctrine, all societies began with unrelated individuals or families (e.g., Cyclopes) and had to pass through three or four stages of development: e.g., hunting, pastoralism, agriculture, and commerce, according to the Scottish jurist Lord Kames. Savages fitted into stage 1 (hunting) and Abraham into stage 2 (pastoralism).

II

In the nineteenth century, philosophy gave way to a new focus of intellectual endeavor: the scientific investigation of origins, as exemplified by Darwin's *Origin of Species* (1859). This new interest in origins spread to the origins of

law. Three landmark works appeared at roughly the same time in mid-century: Sir Henry Maine's *Ancient Law* (1861), Johann Jakob Bachofen's *Das Mutterrecht* (1861), and Numa Denis Fustel de Coulanges' *La cité antique* (1864). The most prominent of these three scholars was Maine, whose work was tremendously influential, being cited even by Marx and Engels (albeit not always positively). It remains a classic of legal history until today.

Maine's thesis was that the original unit of society was the patriarchal family (not the individual) and that as families coalesced into larger units (villages or clans) following a deterministic ethnography, the law also developed in a series of stages. The first three stages were:

1. arbitrary decisions of the patriarch or the king, who was a patriarch writ large;
2. customary law guarded by aristocracies, who inevitably abused their monopoly of knowledge;
3. law codes, resulting from popular agitation and the invention of writing.

In these early stages, the law had certain standard characteristics, in particular, formalism; the priority of procedure over substance and of status over contract, communal property, and private revenge (as opposed to criminal law). "Progressive" societies overcame these limitations by legal tools such as legal fictions, equity, and, ultimately, legislation.

Maine's theory was evolutionary, that is, it saw the law as developing slowly and organically along a well-defined path, pre-determined by the social and economic development of society, analogous to the Darwinian view of the ascent of man. The same is true of his contemporaries. They argued over details, for instance whether patriarchy or matriarchy came first, but they all used the same approach. It was an approach that suffered from two limitations:

1. These nineteenth-century historians had essentially the same evidence on early law available to them as did the philosophers of the previous century, except perhaps for more ethnographic reports. In Maine's case, it was even narrower. He purported to write a history of Indo-European law and therefore ignored the evidence of the Bible, although in practice he drew wider conclusions and his work has always been taken to have universal validity. Maine basically elevated certain incidents related in Livy's *Early History of Rome* to universal principles of legal history.
2. Although no longer teleological, the historians' approach failed to break out of the paradigm that had been created by the philoso-

phers. On the contrary, they took the eighteenth-century model and applied it, reinforcing it with new sciences, such as geology and anthropology. They continued and developed what was effectively an evolutionary determinism. For example, a popular concept was that of "fossils": early written evidence and contemporary primitive rituals that contain relics of earlier practice.

By the 1890s there was broad agreement on certain features of legal evolution, which became conventional wisdom, including, for example:

1. Society evolved from family to clan to kingdom.
2. Property evolved from communal ownership to private ownership.
3. Injury and death were dealt with initially by revenge, which was then replaced by payment and finally by punishment.
4. Liability was strict (*Erfolgshaftung*), with the mental element only gradually being introduced.
5. Early law was suffused with religion and gradually became secularized.

III

By the late nineteenth century, decipherment of hieroglyphics and of cuneiform script had recovered the lost civilizations of the ancient Near East, until then only known through garbled fragments of information in Hebrew and Greek sources. At the same time, advances in science had expanded the chronology of pre-history by tens of thousands of years.

The new data included legal sources. In 1877 the first cuneiform legal documents were published and the trickle soon became a flood. The greatest impact was the publication in 1901 of the Law Code of King Hammurabi of Babylon (CH), which a French archaeological team had discovered the year before and brought back in triumph to the Louvre (where it still stands). Here was a law code that predated the laws of Moses by a thousand years (on the chronology as then reckoned) and the Roman Twelve Tables by 1500 years. Legal historians flocked enthusiastically to the new source; some learned Akkadian and the cuneiform script. In 1903 David Heinrich von Müller published an edition of CH, the Twelve Tables and Moses' Code in parallel columns. Much ink was spilled on speculating as to the connection between the three.

What was the effect of these astonishing new sources on legal historians? Did it lead to a new paradigm? Not at all. Like the historians of the mid-nineteenth century, who had adopted the paradigm of the philosophers,

historians of the twentieth century sought to impose existing conventional wisdom on the new material.

The great pioneer of cuneiform law, Paul Koschaker, in a study of Babylonian marriage law (1917) argued that marriage was by purchase, unconsciously (or consciously?) echoing Aristotle's assertion that primitive Hellenes had once upon a time purchased their wives from one another (*Politics* 2.11). He also insisted on the *patriarchal* nature of the Babylonian family as explaining many features of Babylonian law. Geoffrey Rolles Driver and Sir John Miles, in their classic commentary on CH (1952), set out "the development of the Semitic theory of punishment." I quote it here in full, because it is the quintessence of an evolutionary theory:

> The family is the primitive unit of which the paterfamilias is the chief, but it does not long live in isolation; groups are formed for security, and matters affecting the group are decided by the king or chief. . . . If one member of the family injures another, the matter is settled by the head of the family who does what he thinks right to requite the wrong. . . . If, however, one member of a family injures a member of another . . . a feud arises between the two families. . . . Here the group itself is concerned . . . for the blood-feud is civil war. The community must then lay down rules and the first is that, when the blood of the murderer has been shed, the murder has been requited and peace between the two families shall be restored. Here the germ of one of the principal limitations on the indiscriminate vengeance of the blood-feud appears, the principle of "tit for tat" or talion. This principle is applied not only to slaying but to all corporal injuries, and the doctrine that the punishment must fit the crime begins its history. The other limitation on the blood-feud is the recognition of "composition," whereby the offending party buys off the consequences of his act. In the first instance composition is purely voluntary, a private agreement between the two families, which is perhaps the earliest type of contract. Subsequently, composition for certain offences became compulsory. . . .

This beautifully elegant exposition is a masterpiece of *a priori* reasoning. It could have been lifted straight out of Maine's history of Indo-European law. What about the evidence? Sources are hung upon the development model like cladding on a scaffold. In CH, talion is prescribed for aristocrats and fixed payments for commoners. Therefore, according to Driver and Miles, CH has partially reached the stage of composition, but only for the lower classes. Using the same method, other scholars created a different history of development. For example, Arthur Sigismund Diamond had argued that composition must have preceded talion, because primitive society

saw life purely in economic terms. The discovery of laws predating CH that prescribed fixed payments for injury seemed to confirm his theory. Unfortunately, the Hittite Laws, which were later than CH, also had fixed payments. This difficulty was easily overcome by assuming a different rate of progress towards civilization among the different societies, in the manner of Maine's distinction between progressive and backward societies. The reasoning formed a perfect circle: societies that are more primitive have fixed payments; evidence that they are more primitive is the existence in their laws of fixed payments.

The many societies that were attested by new discoveries from the ancient Near East could thus be contrasted by assigning them different rungs on the evolutionary ladder and all fitted neatly into place. Within a society, progress could be marked by contrasting different laws from different periods, and if this did not work, by dissecting the same law. Seeming contradictions within a law could be resolved by assuming interpolation of new words or phrases into an old text to accommodate developments in legal doctrine. Of course, the editing had to be clumsy, or the signs of interpolation would not be visible.

Evolutionary determinism has the benefit of explaining similarities between laws in different systems without the need for any connection between them; systems at the same stage of development are bound to have similar laws. This was adopted with enthusiasm by scholars wishing to promote the particularity of the legal system in which they specialized. After an initial wave of pan-Babylonianism, a reaction set in. Throughout the twentieth century, Greek, Roman, and biblical historians hastened to deny any connection between the cuneiform systems and their own law. Particularism could be found even within the cuneiform systems, with Babylonianists denying connections with Assyrian law, for example.

Here at least, the rising tide of evidence has slowly but surely swamped particularist objections. Fifty years ago scholars could still be found who claimed that the virtually identical text of law about the goring ox in Exodus and in Codex Eshnunna (a law code from a kingdom to the north of Babylonia slightly pre-dating the reign of Hammurabi) was pure coincidence. Now the derivation of biblical law from cuneiform models is unquestioned, although the nature of the relationship is still a matter of debate. In the Greek and more slowly in the Roman sphere, ancient Near Eastern influence on local law, still rejected with vehemence some twenty years ago, is being admitted as part of a general pattern of interconnection ranging through myth, theology, and material culture. Ethnography, however, under the modern guise of anthropology, still thrives as a source of evolutionary determinism

and even of particularism. There are biblicists on the one hand and classicists on the other who still consider early Hebrew law or early Greek law (from as early as the tenth to seventh centuries B.C.E.) to have more in common with the practices of twentieth-century stone-age tribes than with each other.

IV

At the beginning of the twenty-first century we have reached a point where we can reject the model of early law based on an intellectual tradition going back to eighteenth-century philosophy. Instead, we need to create a new paradigm based on the mass of evidence that has accumulated over the last 150 years.

Surveying that evidence in the manner of an archaeologist's initial survey, we see that the earliest law that we can recover comes from the Near East. The sources from that region predate by far sources from other early civilizations such as India and China. They fall into roughly three categories:

1. By far the largest group is documents in cuneiform script, mostly written on clay tablets. They form a good ninety percent of our sources, albeit solely due to the accident of preservation. Clay is not perishable; other media such as papyrus and parchment are. Most cuneiform tablets come from Mesopotamia, with a small quantity from Syria and Anatolia.
2. A smattering of sources comes from Egypt, in the various Egyptian scripts, and a few documents in Aramaic are found in Egypt and Syria. Some early legal inscriptions have been discovered in Greece, mostly from Crete (such as the Gortyn Code).
3. Finally, there are the sources known previously, that have survived by tradition rather than being recovered by excavation. The main examples are the Hebrew Bible, the Twelve Tables, and other fragments culled from later Greek and Roman literary sources.

The earliest decipherable legal documents in cuneiform date from the twenty-seventh century B.C.E. and they continue until the fourth century B.C.E.. Egyptian Demotic documents begin in the seventh century B.C.E. but only become numerous from about the fourth century B.C.E. The Hebrew Bible, Aramaic documents, and early Greek and Roman material date between the ninth and the fourth centuries B.C.E. With the conquest of the Near East by Alexander in the fourth B.C.E., Greek gradually replaced the other languages and scripts, although Demotic survives into the first century C.E.

We can thus conveniently describe the earliest phase of recorded law as dating roughly from the twenty-seventh to the fourth centuries B.C.E., after which the Hellenistic period ushers in a new phase. As we shall see, it is possible to describe the end of early law in more detail and endow it with more significance.

Turning our attention to the types of sources available, we can discern five broad categories:

1. Records of contractual agreements make up the bulk of the legal documents of practice, and of these the two largest types by far are land sales and loans.
2. A small number of texts are records of litigation. They are not law reports in the modern sense: they contain no legal argument, merely a summary of the facts and the result, and sometimes elements of the evidence.
3. An even smaller number of texts record legislation, in the form of royal decrees, instructions, and the like.
4. Making up a small but significant genre of their own are the so-called "law codes." CH is the most complete and prominent example, but in total seven such codes exist in cuneiform, one in Greek and one in Latin.
5. The Hebrew Bible contains examples of all the above, including three law codes. They have been transformed by being embedded in a different literary form. The historian can extract legal information from the different literary genres in the Bible and the same applies to miscellaneous sources such as myths, letters, and lexical lists.

A survey of this immense material—the legal documents of practice run into the tens of thousands—reveals three quite startling features.

The earliest decipherable legal documents (from Sumer in southern Mesopotamia) reveal a legal system that is already mature. They contain contracts relating to the sale of land that presuppose a settled agricultural, indeed urban, society with governmental institutions, a bureaucracy, law courts, and long-established legal procedures.

The latest legal documents (from Babylonia under the Persian empire) are still based on the very same legal principles. The principles underlying the law of sale or marriage or even evidence have not fundamentally changed.

This continuity is geographical as well as chronological. Many of the legal principles and rules present in Mesopotamia are reproduced throughout the Near East with varying degrees of similarity over almost three millennia of documentation. Israel and Hatti, for example, present strikingly

close affinities, while Egypt seems to be a little more remote, although it is difficult to judge due to the paucity of documentation from Egypt. Even more startling is the fact that some of those principles and rules are reproduced in what we know of law from pre-Hellenistic Greece and Rome.

Our immediate conclusions are that the law in the earliest known phase of legal history, focused on the ancient Near East, was essentially static over the course of several millennia and transcended individual legal systems, covering the whole region and beyond. This is not to say that laws did not change or that individual legal systems were not autonomous, but there was a core legal tradition common to all that did not develop significantly over this period.

This conclusion seems counter-intuitive. By its very nature, law must change to meet changing circumstances. New cases will create new law. The model, however, is our own modern society, where the restless pace of technological development and social change forces the law into a constant frantic rush to keep up. Massive resources are poured into the effort, in the form of specialized experts and branches of government dedicated to churning out fresh legislation, interpreting and implementing its provisions. The reasons behind our present situation are suggestive of the reasons for the very different conditions in early antiquity.

The world of the ancient Near East was more static than our own, but not entirely so. Cities, states, and empires rose and fell. Population movements led to radical changes in the ethnic composition of the area and brought in new cultures as much as in later periods. International trade and diplomacy facilitated the exchange of ideas. The social background is therefore important, but not the sole factor.

Justice comes from the heart, law from the head. Every child has an innate sense of justice, summed up in those familiar words "but it's not fair!"—likewise our most distant ancestors. Law, by contrast, is an intellectual construct. Although a society cannot exist without law, the latter is an artificial product of the mind. For individual judgments to become more than ad hoc justice, they must be formulated as rules that are reasonably predictable in their results and mutually consistent. All the more so with legislation and treatises. Consequently, a legal system cannot be more advanced than the system of thought and reasoning generated by its host society.

If we look again at the overall picture given by these early sources from the ancient Near East, three more remarkable features strike us—remarkable, that is, by their absence.

First, nowhere to be found, in the legal literature or elsewhere, are the basic components of modern legal reasoning, namely, division into theo-

retical categories and definition of abstract concepts. Nowhere do we find anything remotely like the statement, fundamental to our thinking, that, for example, there are three types of property: real, personal, and intellectual. Technical legal terms like inheritance, adoption, pledge, and hire abound, but nowhere are they defined. The most intellectualized form of source, the law codes, which were the equivalent of academic treatises on the law, are formulated as lists of individual cases, such as:

> If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner's loss.

In this respect, they form part of what is known as Mesopotamian science, which attempted to understand the world through lists: of trees, plants, animals, and precious stones, of medical symptoms and their diagnosis, and of omens and their meaning, for instance:

> If a woman gives birth and the right ear (of the child) is small, the house of the man will be scattered.

Second, another basic feature of modern law is missing: citation of authority, whether statute or precedent. The nearest the sources come are a few vague references to a rule being "according to the words of the stele." They undoubtedly refer to a statute inscribed on a monument, but it is a reference, not a citation. It is possible that we do not have the right type of source, that citation took place during legal argument in the courts but has not been recorded. But there is no hint of any such notion in letters or other literature, whereas when we reach the Hellenistic period the opposite is true. The sources indulge in an orgy of citation: in Greek courts and by Roman and Rabbinic jurists. For the earlier period, we gain the impression that the law was expressed in decrees, law codes, or precedents; for none of them was the exact wording of the text of any significance, even when it existed in written form.

Third, among the long lists of professions—doctor, soothsayer, priest—there is one missing: the lawyer. Or, to be more exact, the jurist: the expert in the interpretation of the law.

Accordingly, the legal systems of the ancient Near East differed intellectually from modern systems and from the systems of the Hellenistic period in how they formulated the law and how they read it. The reason is the Greek intellectual revolution. Mesopotamian science controlled the law, and Mesopotamian science lacked the tools that Aristotelian logic was to provide and which we use to this day. In consequence, the law was condemned to remain static. Once the law could be formulated in exclusive

categories, and its technical terms defined, the text of legal instruments such as statutes and contracts took on a new role: they became autonomous, to be interpreted without regard to the circumstances of their creation or their creator. Interpretation became an art, if not a science, and required a new type of specialist: the jurist.

The flood of legislation and the restless juridical innovation that characterizes modern Western systems has its origins in the philosophical revolution of the eighteenth-century Enlightenment, which gave legal systems new intellectual tools, so eagerly grasped by philosopher-jurists such as Jeremy Bentham in England and Friedrich Carl von Savigny in Germany. That revolution, however, relied on the Greek philosophical revolution of two millennia earlier and on the new intellectual tools that it gave the Greek orators and Roman jurists. They used those tools to create law as we recognize it today.

The revolution in early law that I am describing did not happen overnight. The static picture that I have painted begins to crumble from about the seventh century B.C.E. in the Mediterranean basin (roughly around the time of the Presocratic philosophers). For example, the book of Deuteronomy, which dates to the seventh century and the Assyrian occupation of Israel, takes traditional ancient Near Eastern material, much of it from Assyria, and begins to transform it in innovative ways. Traditional debt-release decrees, an instrument in use for millennia, are turned into cyclical legislation of a type not seen before: the sabbatical and jubilee years. In the sixth century, the Gortyn Code still has the form of an ancient Near Eastern law code but has paragraphs that definitely indicate that it was legislative in effect. It even contains a definition of a legal term. Citation appears in the Greek orators of the fifth and fourth century and in the later books of the Bible, but jurists do not appear until the third century in Rome.

To illustrate how this "revolutionary" view of legal history affects development of the law, I will return to an earlier example that was emblematic of the evolutionary school: homicide. The evidence of the sources shows a traditional system established already in the third millennium and very widespread: in Mesopotamia, among the Hittites in Anatolia, in the Hebrew Bible, and in the Homeric epics. The principle is that the relatives of a homicide victim have a dual right: to execute the killer by way of revenge or to accept payment by way of composition. The two rights were contemporaneous, not consecutive, in time. Revenge was private, but it was not a lawless vendetta. It was a judicial remedy awarded by the courts where they deemed the circumstances appropriate. Moreover, the court could

calibrate the dual right according to the seriousness of the offense, determined by criteria such as the mental state of the killer (premeditated or not) or the status of the victim (head of household or son). The court could raise or lower the degree of revenge or insist that the right-holders accept composition and fix the level thereof.

As an aside I should explain that commentators who thought only revenge or only composition was exclusive to a legal system because a law code or a paragraph therein mentioned only one of them failed to appreciate the casuistic nature of the sources, which do not state principles, only the rule applicable to a narrow set of circumstances. Where a paragraph in a law code set a fixed payment, the underlying alternative of revenge would have been self-evident to any contemporary reader, although not mentioned explicitly.

At the same time, the ancient systems did not lack purely public offenses. Offenses that were deemed to pollute society, such as blasphemy or incest, were likely to bring down divine wrath upon the whole society. The authorities therefore acted to arrest and execute the culprit, just as in a modern prosecution of crime. Homicide did cause some local pollution, but it did not fall within this category of polluting crimes that endangered society as a whole.

Somewhere between the seventh and fifth centuries B.C.E. a radical change appears in legal systems of the Mediterranean basin. The Priestly source in the Bible polemicizes against accepting composition for homicide; the victim's family must exact revenge. Its rationale is that murder pollutes the Promised Land, like blasphemy. Thus the Priestly source appears to be engaged in an attempt to shift murder, hitherto understood as a purely private matter between the culprit and the victim's family, into the category of public offenses such as blasphemy, apostasy, and incest, and thereby turn the private right of revenge into a public duty. It even places a strained interpretation on the customary phrase "life for life" in order to achieve this result, the first known instance of juristic interpretation of a text (Lev. 24:17–21).

The same tendency is apparent over the same period in ancient Greece. Homeric law in the eighth century still accepts composition as a legitimate alternative to revenge. By the fifth century, Athenian homicide law is still based on revenge by the victim's family, but that revenge has changed from a right to a duty. One of the reasons given is that it is necessary to free the whole state from pollution caused by homicide. In both systems, the groundwork has been laid for treating murder as a public crime.

V

To summarize, the early history of law can be divided into three periods. Taking them in reverse chronological order, the latest is the *classical* period dating from the fourth century B.C.E. It is based on Greek philosophy and exhibits the reasoning and general characteristics that are familiar to us in modern legal systems.

The preceding period, which we may call the *archaic* period, begins for us in the early third millennium with the first known legal sources, but must already have existed long before then. It is based on Mesopotamian science and its legal reasoning seems alien to us, not least because of the intellectual tools that it lacks. Between this and the classical period there is a transitional phase from about the seventh to the fifth century B.C.E. when radical new ideas from the Mediterranean are penetrating and transforming the ancient tradition. At its outset, Mesopotamian science must have been equally revolutionary in its effects, but we can only speculate about the circumstances of its creation or of its application to law.

The invention of writing in the late fourth millennium is an obvious point of reference, but in my view is unlikely to have been a direct cause. Throughout the archaic period the practice of law was essentially oral, both in transactions and in litigation. Writing was adjuvant: an occasional convenience but by no means a necessity. Writing could at most have been an indirect cause, in that it was a technology of power, which aided new modes of social control and organization arising from urbanization. On the other hand, the turning-point may have been the advent of urbanization itself in the mid-fifth millennium, predating the advent of writing, when major organizational changes would already have been needed. Or it may have been even earlier, at the agricultural revolution at the beginning of the eighth millennium, when ownership of land became necessary. It is impossible to know and unwise to speculate, but it does give us some perspective on the evolutionary theories of ancient law.

It should be clear by now that the supposed features of primitive law proposed by evolutionary theories, if they ever occurred, are irrelevant to the archaic period. The literary sources on which they rely relate mostly to the early first millennium, when a settled, static tradition based on highly organized urban societies had already existed for at least two thousand years and possibly much, much longer. Rules which supposedly represented the first faltering steps of a nascent legal system can be shown to be derived from that long-standing and widespread tradition.

If primitive law did evolve in the manner posited by eighteenth-century philosophers and repeated by historians of the following centuries, it can only have been in the first period of early law, which we may term the *prehistoric* period and which, for all we know, went back to the Neanderthals. Unfortunately, since we have no written sources from that period, we cannot know the nature of law at its origins nor how it evolved. We can only conjecture. But I am a historian and leave conjecture to the philosophers.

Note

Charles Alexander Robinson, Jr., Memorial Lecture, Brown University, Monday January 23, 2009. I thank the editors for accepting the manuscript in the shape of the lecture. Essential literature: Bachofen 1861; Darwin 1859; Diamond 1971; Driver and Miles 1956; Fustel de Coulanges 1982 (1864); Hobbes 1651; Kames 1758; Kohler 1897; Koschaker 1917; Kuper 2005; Maine 1861; Morgan 1864; von Müller 1903; Rousseau 1762; Stein 1980; Vico 1744; Westbrook 2003b.

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ABBREVIATIONS

AbB	*Altbabylonische Briefe in Umschrift und Übersetzung* (Leiden: Brill, 1964–)
ABL	*Assyrian and Babylonian Letters,* ed. R. Harper (London: Luzac, 1892)
ADD	Johns 1898–1923
AfO	*Archiv für Orientforschung*
AHw	von Soden 1965–1981
ANET	*Ancient Near Eastern Texts Relating to the Old Testament,* ed. J. B. Pritchard, 3rd ed. (Princeton, NJ: Princeton University Press, 1969)
ARM	Archives Royales de Mari
ArOr	*Archív Orientální*
BE	*The Babylonian Expedition of the University of Pennsylvania, Series A: Cuneiform Texts* (Philadelphia: University of Pennsylvania)
BIN	*Babylonian Inscriptions in the Collection of J. B. Nies* (New Haven, CT: Yale University Press, 1917–)
BM	British Museum (in this volume, refers to cuneiform tablets)
BNP	*Brill's New Pauly: Encyclopaedia of the Ancient World,* multiple vols. (Leiden: Brill, 2002–2010)
CAD	*Chicago Assyrian Dictionary* (Chicago: Oriental Institute, 1956–1999)
CAH	*The Cambridge Ancient History,* multiple vols., 2nd and 3rd eds. (Cambridge: Cambridge University Press)
CQ	*Classical Quarterly*
CT	*Cuneiform Texts from Babylonian Tablets in the British Museum* (London: British Museum, 1896–)
CTH	Laroche 1966
DNP	*Der Neue Pauly: Enzyklopädie der Antike,* multiple vols. (Stuttgart: Metzler, 1996–2003)
EA	Knudtzon 1907–1915 (1964)
HSCP	*Harvard Studies in Classical Philology*
JANES	*Journal of the Ancient Near East Society of Columbia University*
JAOS	*Journal of the American Oriental Society*
JHS	*Journal of Hellenic Studies*
JJP	*Journal of Juristic Papyrology*
KAJ	*Keilschrifttexte aus Assur juristischen Inhalt,* ed. E. Ebeling (Leipzig: J. C. Hinrichs, 1927)
KAV	Schroeder 1920
KBo	*Keilschrifttexte aus Boghazköi* (Leipzig: Hinrichs, 1916–)

Kt	Inventory numbers of Kültepe texts
LE	Laws of Eshnunna
LH	Laws of Hammurabi
MAL A	Middle Assyrian Laws, Tablet A
MVN	*Materiali per il vocabolario Neosumerico*, vol. 3 in *The John Frederick Lewis Collection: Texts from the Third Millennium in the Free Library of Philadelphia* (Rome: Unione Accademica Nazionale–Multigrafica Editrice, 1975)
NBL	Neo-Babylonian Laws
Nbn	*Inschriften von Nabonidus, König von Babylon (555–538 v. Chr.) Babylonische Texte*, 1–4., ed. J. N. Strassmeier (Leipzig, 1889)
Or	*Orientalia*
PRU	*Palais Royal d'Ugarit: Mission de Ras Shamra* (Paris: Klincksieck, 1956–)
RB	*Revue Biblique*
RdA	*Reallexikon der Assyriologie*, ed. E. Ebeling et al., multiple vols. (Berlin: de Gruyter, 1928–ff.)
RE	*Paulys Realencyclopädie der classischen Altertumswissenschaft,* multiple vols. (Stuttgart: Metzler)
RIDA	*Revue Internationale des Droits de l'Antiquité*
RS	Ras Shamra numbers
SHA	*Scriptores Historiae Augustae*
TvR	*Tijdschrift voor Rechtsgeschiedenis*
VAS	*Vorderasiatische Schriftdenkmäler der Königlichen Museen zu Berlin 6: Neobabylonische Kontrakte und Sonstige Urkunde,* ed A. Ungnad (Leipzig, 1908)
ZA	*Zeitschrift für Assyriologie*
ZSSR	*Zeitschrift der Savigny Stiftung für Rechtsgeschichte (Romanistische Abt.)*

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